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In the Supreme Court of the United States
OCTOBER TERM, 1981

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

CITY OF CHEROKEE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

In this case the Interstate Commerce Commission granted an application for abandonment of a line of railroad, after considering the wages of the train crews assigned to the line as part of the railroad's costs of continuing operations and after weighing those and other costs against the impact that abandonment would have on shippers and affected communities. The court of appeals held, *inter alia,* that the Commission could not consider the labor costs as part of the railroad's avoidable costs because protective provisions of a collective bargaining agreement might prevent the railroad from immediately saving the full amount of those costs by discharging the employees and that the Commission failed to undertake the balancing of public need for continued operation of the line against the burden imposed on the railroad and upon interstate commerce as required by this Court's decision in *Colorado* v. *United States,* 271 U.S. 153 (1926).

The questions presented are:

1. Whether the Commission could consider the railroad's labor costs in deciding whether abandonment was consistent with the public convenience and necessity.

2. Whether the court correctly reversed the Commission's decision on the balancing of public need against the burden on interstate commerce—a ground not raised by any petitioner and, for that reason, not addressed by the respondents.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-27a) is reported at 641 F. 2d 1220. The opinion of the Interstate Commerce Commission (App. D, *infra*, 30a-41a) is reported at 363 I.C.C. 93. The opinion of Division 1 of the Commission (App. E, *infra*, 42a-51a) is unreported. The opinion of the Administrative Law Judge of the Interstate Commerce Commission (App. F, *infra*, 52a-85a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 28a) was entered on February 12, 1981. The Commission's timely petition for rehearing was denied on April 9, 1981 (App. C, *infra*, 29a). On June 30, 1981 Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to August 17, 1981, and on August 11,

1981 further extended the time to August 24, 1981. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of 49 U.S.C. (Supp. III) 10903 *et seq.* and 49 C.F.R. Part 1121 *et seq.* are set forth at App. G, *infra,* 86a-94a.

STATEMENT

1. Under the Interstate Commerce Act, a railroad may abandon an interstate rail line only if the Interstate Commerce Commission finds "that the present or future public convenience and necessity require or permit the abandonment . . . ." 49 U.S.C. (Supp. III) 10903(a). The Commission's statutory responsibility is to balance the needs of those being served by the line against the burdens of continued operations on the carrier and the interests of the national transportation system. See *Colorado* v. *United States,* 271 U.S. 153 (1926); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.,* No. 79-1336 (March 9, 1981).

In reaching its determination the Commission has traditionally given significant, if not primary, consideration to whether the line sought to be abandoned is or can be profitable—that is, whether the revenues produced by the line exceed the costs attributable to operating it. The costs the Commission has considered for this purpose have commonly been called "avoidable" costs—*i.e.,* costs the railroad would avoid if the line were abandoned. The Commission has promulgated regulations implementing the statutory abandonment provisions that require the applicant for abandonment to submit evi-

dence of the line's revenues and "avoidable costs." 49 C.F.R. 1121 *et seq.*[1]

2. In 1977 the Illinois Central Gulf Railroad (ICG) applied to the Commission for authority to abandon a 96-mile line of railroad, known as the Sioux Falls District Line, between Cherokee, Iowa, and Sioux Falls, South Dakota. In a hearing before an administrative law judge, the ICG adduced evidence that in 1976 and 1977 the revenues attributable to the line had fallen significantly short of what ICG claimed to be the avoidable costs of operating the line—including, most significantly, the wage costs of the two train crews assigned to the line. (App. F, *infra,* 59a-62a).[2]

The Commission's administrative law judge, however, recommended that the abandonment application be denied (App. F, *infra,* 84a-85a). Among other reasons, the ALJ concluded that the wages of the train crews were not properly deemed avoidable costs because a witness for the United Transportation Union testified that provisions of a collective bargaining agreement between ICG and the Union obligated ICG to continue paying the wages of the Sioux Falls District line's two crews indefi-

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[1]Nothing in the statute, however, makes the Commission's ultimate abandonment decision turn on an assessment of the operation's "avoidable costs." Another statutory provision, 49 U.S.C. (Supp. III) 10905, directs the Commission to delay issuance of an abandonment certificate if qualified persons make a subsidy offer to the railroad "equal to . . . the difference between the revenues . . . and the avoidable costs of providing rail freight transportation on the line . . . ." 49 U.S.C. (Supp. III) 10905(b)(2). For that purpose, Section 10905(a)(1) defines "avoidable costs" as "all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line . . . were abandoned . . . ."

[2]ICG's evidence showed, approximately, a $124,000 profit in 1975, a $53,000 loss for 1976 and a $116,000 loss for the first nine months of 1977. App. F, *infra,* 60a.

nitely, regardless of whether the trains operated. The ALJ concluded that this expense was therefore not "avoidable" upon abandonment (*id.* at 61a, 80a).[3] The ALJ also refused to consider property taxes attributable to the line as avoidable costs because ICG had received no firm offers to buy its real property on the line and thus it was not certain that those costs would be immediately eliminated upon abandonment (*id.* at 62a).

After deducting these wages and property taxes from ICG's cost calculations, the ALJ found that during the last several years, revenues from the line had exceeded avoidable costs (*ibid.*). In addition, although the ALJ found that traffic had steadily decreased on the Sioux Falls District line since 1974, she faulted the railroad for most of the decline and predicted the line would be profitable in the future. The ALJ ultimately concluded that the shippers' interest in continued service outweighed the burden on the railroad of maintaining service (*id.* at 83a-84a).

3. On administrative appeal, Division 1 (a 3-member panel of the Commission) rejected the ALJ's recommendation and granted abandonment. (App. E, *infra*, 42a-51a). Although the Division adopted the ALJ's factual findings, it held that the labor costs and property taxes attributable to the line should be considered as avoidable costs (*id.* at 44a-46a). In addition, the Division concluded that the ALJ's predictions for the line were "unduly optimistic and not supported by the record" (*id.* at 46a). Finally, the Division concluded the burdens on ICG of continuing operations outweighed the burden that abandonment would impose on shippers and the public (*id.* at 47a-48a).

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[3]The agreement was not introduced in evidence, however, and the witness' claim was denied by the railroad's attorney (App. A, *infra*, 14a n. 7).

On further administrative review, the full Commission affirmed Division 1's decision and further explained the reasons for considering the labor costs in this case as avoidable costs (App. D, *infra*, 30a-41a). First, the Commission stated that the category of "avoidable costs" should include all costs that are reasonably attributable only to the operations of the line sought to be abandoned. Costs that are not properly classed as avoidable, in contrast, are those that may be allocated to the operations sought to be abandoned as well as other operations that will continue following abandonment—*i.e.*, joint costs. The crew costs in this case are not joint costs, but are attributable only to the operation of trains over the Cherokee-Sioux Falls line (*id.* at 33a).

Second, the Commission concluded that the provisions of the collective bargaining agreement would, at most, only defer temporarily the carrier's ability to avoid these labor costs following abandonment. Thus, even on the doubtful assumption that the agreement would be invoked or construed to prohibit the reassignment of these particular crews to other duties, the Commission stated that (App. D, *infra*, 35a n. 5):

> no one contends that they will continue indefinitely to be paid for doing nothing. At most it will be until the local agreement is next renegotiated, or in the most extreme imaginable case until these workers reach retirement age. Even under the most ironclad attrition agreement, attrition eventually takes place.

Finally, the Commission concluded that there were significant policy reasons for declining "to use the prospective imposition of labor protection provisions as an argument for ignoring present labor costs when considering the abandonment of a branch line." (App. D, *infra*, 36a). As the Commission explained (*ibid.*; footnote omitted):

> [S]ince public policy supports the cushioning of the effects on employees of needed changes in rail operations of authority through protective provision, so likewise it is in the public interest to encourage private agreements which have a similar effect of stabilizing employment and protecting employees from sudden adverse changes. The existence of such agreements, however—whether called attrition agreements, "tabulated local rules," or any other designation—must likewise not be allowed to prevent those adjustments in rail operations and authority which are otherwise consistent with the public interest and are needed to keep our privately owned railroads out of the bankruptcy courts.

In addition to its consideration of the labor costs, the full Commission affirmed Division 1's conclusion that real property taxes should be considered as avoidable costs (*id.* at 36a-38a),[4] and its conclusions concerning ICG's future traffic prospects (*id.* at 41a). Finally, the Commission found that, on balance, the public convenience and necessity justified abandonment. Whether the burden on ICG of operating the line was undue, the Commission stated, depends on other factors "which have been fully considered in this case" (*id.* at 34a). The Commission added, "we see no basis for disturbing Division 1's ultimate weighing of the factors of public conve-

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[4]With respect to the tax issue, the Commission stated (App. D, *infra*, 37a):

> The Administrative Law Judge was apparently concerned that, in the absence of firm offers, it is not completely certain that the applicant will be able to sell the property and thus terminate its liability for taxes on "Day One" following abandonment. That is not the test. A cost is avoidable if it can with reasonable certainty be avoided within a reasonable time following abandonment.

nience and necessity, which led it to conclude that abandonment should be permitted" (*id.* at 41a).

4. On judicial review, a divided panel of the court of appeals reversed and remanded the Commission's decision. (App. A, *infra,* 1a-27a) The majority decision turned upon what it called the two dispositive questions in the case—"whether the Commission correctly included train and engine crew wages as avoidable costs . . ., and whether the Commission properly balanced the interests of the carrier and the affected communities before it authorized abandonment." As Judge Adams noted in dissent, only the first issue had been raised by petitioners in the court of appeals (*id.* at 18a, 24a).

With respect to the first issue, the court held that, because of the provisions of the collective bargaining agreement, the Commission erred in viewing the crew wages as avoidable costs (*id.* at 14a-16a). Notwithstanding the Commission's finding to the contrary, the court adopted the ALJ's conclusion that "the wages of the two train crews would have to be paid indefinitely as a result of a collective bargaining agreement . . . ." (App. A, *infra,* 16a). As to the Commission's explanation for considering the labor costs, the court simply stated: "[The Commission] was not authorized to redefine the term 'avoidable cost' as synonymous with 'joint cost' and end its discussion there." (*ibid.*).[5]

Although no petitioner had made the contention on judicial review, the majority also found that the Commission had not properly balanced the interests of the carrier and the affected communities in authorizing abandonment. The court construed the Commission's decision as

[5]Although reversing the Commission's consideration of the labor costs, the court, without further discussion, "affirm[ed] the Commission's decision that property taxes may be treated as avoidable costs." (App. A, *infra,* 12a n. 5)

having stated "in substance" that "if the carrier could not operate the branch line as a profitable going concern (and if it could turn a greater profit through abandoning the line and selling its property holdings), then abandonment would be permissible" (*ibid.*). As the court perceived it, the Commission's approach erred in failing to consider and balance the effect of abandonment on shippers and communities (*id.* at 16a-17a).

Judge Adams dissented (App. A, *infra*, 17a-27a). Among other points, Judge Adams disagreed with the majority's analysis of the labor costs. First, he noted that, contrary to the majority's assertion, the Commission had not stated that avoidable costs are synonymous with joint costs; indeed, the Commission had stated that avoidable costs are *not* joint costs (*id.* at 20a). Furthermore, Judge Adams argued that the Commission's definition of avoidable costs was not unreasonable because the Commission had rationally concluded that the labor agreement would at most defer for a time the savings of labor costs, and also that important policies made it inappropriate to use labor protective provisions as a basis for ignoring present labor costs. Moreover, Judge Adams stated, the majority's exclusion of avoidable costs was inconsistent with its finding that property taxes had been properly included as avoidable costs (*id.* at 23a). Finally, Judge Adams objected to the court's review of the balancing analysis of the Commission, for that issue had not been raised by the parties. In any event, he concluded, the Commission had balanced adequately the benefits and burdens of abandonment to the railroad and the communities (*id.* at 24a-26a).

REASONS FOR GRANTING THE PETITION

1. The court of appeals' decision that the Commission cannot consider certain kinds of labor costs when deciding whether the public interest justifies abandonment,

presents important and recurring questions warranting this Court's review.[6]

Labor costs represent a very significant portion of the cost of rail operations and most railroad employees are covered by collective bargaining agreements that typically contain provisions for employee protection which, like those in this case, may prevent the railroad from immediately eliminating all of those costs upon abandonment. Accordingly, the proposition that the Commission cannot consider labor costs covered by such provisions in balancing the burdens and benefits of continued operations, if sustained, is one that would be significant in almost every abandonment case and would substantially affect the Commission's administration of the abandonment provisions of the Act.

Such a significant limitation on the Commission's ability to consider evidence adduced in favor of rail abandonments contravenes, we submit, important Congressional policies concerning the regulation of the national rail system. As this Court has recognized in many cases, one of the principal purposes of the Interstate Commerce Act was to vest exclusively in the Commission the difficult task of determining whether the public interest permits abandonment of a rail line. Its purpose in so doing was to ensure that, while local interests in continued service would be considered, they could not compel operations that would weaken the system as a whole. See *Chicago &*

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[6]The ICG has also filed a petition for a writ of certiorari to review the decision below in No. 80-2122. The questions presented in that petition focus on the court of appeals having simply chosen between the analyses of the Commission and its administrative law judge in violation of the principles of judicial review set forth in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). We agree that the court of appeals' decision seems to reflect the approach condemned in *Universal Camera.*

N. W. Transp. Co. v. *Kalo Brick & Tile Co., supra,* slip op. 9; *Colorado* v. *United States, supra,* 271 U.S. at 162-163.

Recent years have greatly heightened Congress' concern with the health of the nation's railroads and specifically with the extent to which impediments to abandonment have adversely affected them. Thus, in 1976 Congress enacted expedited abandonment procedures to ensure that railroads would not be subjected to prolonged losses on branch lines.[7] As the Senate Report stated (S. Rep. 94-499, 94th Cong., 1st Sess. 4, 44 (1975):

> The railroad industry has been unable to adjust to changing market conditions because its facilities are fixed in place, because the regulatory climate constrained management's ability to merge facilities and abandon obsolete properties and lines, and because traffic has been lost to other modes.
>
> * * * *
>
> [T]he railroad industry should not be forced to continue to internalize all losses from branch line operations, thereby further jeopardizing the industry's already precarious economic health.

Most recently, Congress reemphasized those concerns in the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, which, in Section 402, further expedited abandonment procedures and now requires the Commission to grant abandonment if no protest to the application is

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[7]Section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub. L. 94-210, 90 Stat. 127-130, now codified at 49 U.S.C. 10903 and 10904.

received in 30 days.[8] By precluding the Commission's consideration of rail labor costs, a principal cost of rail operations, the court of appeals may significantly impede

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[8]This and other provisions of the Staggers Rail Act were designed to alleviate what Congress found to be the critical situation of the railroad industry. Thus, as the Conference Committee stated (H. Rep. 96-1430, 96th Cong. 2d Sess. 79 (1980)): "Earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements." For these reasons, the Senate Committee on Commerce, Science and Transportation noted the need to allow railroads "more latitude in ratemaking, operations, mergers and abandonments." S. Rep. 96-470, 96th Cong. 2d Sess. 6 (1980).

One of other provisions of the Staggers Act designed to alleviate the burden of marginal or unprofitable lines is Section 217 (adding a new 49 U.S.C. 10705a), which allows carriers to increase certain rates within specified bounds. Pursuant to this section, ICG in April 1981 filed a proposed rate increase for each shipment on the line involved in this case, and the Commission allowed the increase to go into effect without suspension or investigation on June 13, 1981. Protestants, however, sought a stay in the court of appeals, arguing that the rate increase would be tantamount to a *de facto* abandonment. The court of appeals in No. 81-1607 issued a stay of the increase pending judicial review of the Commission's decision not to suspend, notwithstanding numerous decisions of this Court that courts are without power to enjoin rate increases and that Commission decisions not to suspend increases are not subject to judicial review. See, *Consolidated Rail Corporation* v. *National Association of Recycling Industries, Inc.*, No. 80-568 (January 26, 1981); *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 422 U.S. 444 (1979); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963). ICG sought a stay of the court of appeals stay which Mr. Justice Blackmun denied on July 24, 1981. More recently the United States Court of Appeals for the Sixth Circuit granted a motion to dismiss a petition for review of a Commission decision declining to suspend or investigate a similar surcharge filed by the Consolidated Rail Corporation on the ground that such Commission action was unreviewable under this Court's decision in *Southern Ry.* v. *Seaboard Allied, supra. Michigan Packaging Corp.* v. *ICC*, No. 81-3385, August 14, 1981.

the Commission's ability to meet these concerns and to implement national transportation policies.[9]

The court of appeals' decision also implicates important statutory and administrative policies with respect to railroad employee protection.[10] The Commission's decision not to disregard the labor costs in this case because of the possible effects of protective provisions in the collective bargaining agreement was based in large part on the important policy of not discouraging the negotiation of provisions in labor agreements designed to mitigate the impact of rail adjustments on employees. Although the court of appeals did not mention the Commission's reliance on and discussion of these policies, the effect of its decision is to reject them. This Court has recognized the importance of Commission consideration of such issues in a long line of cases commencing with *United States* v. *Lowden,* 308 U.S. 225 (1939).

2. For the reasons cogently summarized in Judge Adams' dissent, we submit that the court of appeals' decision with respect to the labor costs was plainly erroneous.

First, the court clearly misunderstood the Commission's discussion comparing and contrasting avoidable costs and joint costs. Thus, according to the court: the "Commission . . . stated that the concept of an avoidable

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[9]The United States Court of Appeals for the Seventh Circuit recently declined to follow the decision of the court below on the unavoidability of labor costs, because in the view of the court there was no issue of a restrictive collective bargaining agreement in the latter proceeding. *International Minerals & Chemical Corp.* v. *ICC,* Nos. 80-2096 and 80-2097 (August 3, 1981), slip op. 7-8.

[10]This Court is presently considering other issues involving statutory policies regarding railroad employee protection in *Railway Labor Executives Association* v. *Gibbons,* Nos. 80-415 and 80-1239, probable jurisdiction noted April 27, 1981.

cost is appropriate only when the carrier's costs are shared between two or more revenue producing operations . . .. The Commission was not authorized to redefine the term 'avoidable cost' as synonymous with 'joint cost', and end its discussion there." (App. A, *infra*, 16a). In fact, as Judge Adams noted (*id.* at 20a), the Commission's point was exactly the opposite: that a cost is *not* an avoidable cost if it is a joint cost that may also be attributed to an operation that will continue after abandonment. See App. D, *infra*, 33a.[11]

Second, the Commission did not "end its discussion there", but went on at some length to offer other reasons why, in its view, the alleged protective provisions of the collective bargaining agreement should not preclude consideration of the labor costs. Thus, it explained that at most the provision would only defer the railroad's complete elimination of the labor costs for a time after abandonment, but that the possibility of such a deferral of savings is not a reason for not viewing a cost as avoidable (App. D, *infra*, 34a-36a). This was plainly a factual determination that was within the Commission's competence to make on the basis of its assessment of the record, its experience and its common sense. By reaching a contrary conclusion without even acknowledging the Commission's finding on the matter, the court of appeals simply usurped a function Congress vested solely in the Commission.[12] See *Chicago & N. W. Transp. Co.* v. *Kalo Brick*

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[11]Although the Commission brought this and other manifest errors to the court's attention in a petition for rehearing, the petition was denied (App. C, *infra*, 29a).

[12]Moreover, although the court of appeals adopted the ALJ's conclusions that the wages of the two train crews would have to be paid indefinitely following the abandonment (App. A, *infra*, 16a), it is not clear whether that reflects the court's conclusion that the costs are not avoidable because (1) they will never be eliminated, (2) they will

& Tile Co., supra, slip op. 9; *Colorado* v. *United States, supra,* 271 U.S. at 165-166.

Furthermore, the Commission also explained that important policies favoring employee protection, embodied in a number of statutory provisions, militated strongly against using privately negotiated protective provisions as a reason for disregarding the labor costs of a particular operation that the railroad claims is burdensome and seeks to abandon.[13] This policy determination was also reasonable and within the Commission's well-established province to make, but again, it was not mentioned by the court of appeals.

Finally, the court's rationale for excluding labor costs from consideration is flatly inconsistent with its affirmance of the Commission's finding that property taxes

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not be eliminated immediately after abandonment, or (3) the court does not know precisely when they will be eliminated. If it reflects the latter conclusion, it is possible that the court of appeals would be satisfied by a more detailed evidentiary presentation attempting to predict more precisely when the labor costs attributable to the line are likely to be eliminated. Because the question necessarily involves prediction, however, certainty is unattainable; and how much precision or support the court would require for the Commission's prognostication cannot be gleaned from its decision. More importantly, we believe it is unnecessary and would be enormously burdensome to make a complex evidentiary issue in every abandonment case out of the question of the future effect of every labor protection provision pertaining to affected employees.

[13]See 49 U.S.C. 10903(b)(2); 11347. Indeed, the former section specifically directs the Commission, as a condition of any abandonment authorization, to require the abandoning carrier to provide a certain level of protection for all employees adversely affected by the abandonment. Although the court of appeals did not discuss this provision or the policies behind it, the logic of its decision would require the Commission in an abandonment case to deduct from its consideration of otherwise avoidable labor costs, amounts equal to the carrier's anticipated expense of complying with the labor protection required by Section 10903(b)(2).

are avoidable costs even though they, like the labor costs, may not be immediately eliminated upon abandonment. As Judge Adams noted (App. A, *infra,* 24a):

> It is unclear how the Court can find identical principles and analysis permissible with respect to taxes and irrational with respect to wages. Insofar as the Court has failed to distinguish why the Commission's reasoning is appropriate for property taxes but not for wage costs, the agency will, in the absence of further explication, have difficulty on remand fulfilling the mandate "to articulate, with precision" the analysis underpinning its next determination.

3. In addition to rejecting the Commission's analysis of the labor costs, the court of appeals also reversed and remanded on the separate and independent ground that the Commission had not adequately considered and weighed the burdens of abandonment on affected shippers and community. (App. A, *infra,* 16a-17a). The court of appeals was wrong. The decisions of the full Commission and Division I, whose findings the full Commission adopted by reference, establish beyond question that the Commission considered the impact of abandonment on shippers and affected communities and weighed that impact in deciding whether abandonment was warranted. See App. D, *infra,* 34a-41a; App. E, *infra,* 46a-48a. The Commission's ultimate balancing disagreed with its administrative law judge and was probably different from the balance the court of appeals would have struck. But so long as the record reflects that the Commission has considered the relevant factors, deciding where the public interest lies is the exclusive responsibility of the Commission, and "is not a matter for judicial redecision." *Purcell* v. *United States,* 315 U.S. 381, 385 (1942). In short the court seems simply to have misunderstood the Commission's decision.

Even more disturbing than this error, however, is the fact that no petitioner raised the claim on judicial review that the Commission's consideration and balancing of the various affected interests was inadequate. In fact, as Judge Adams noted (App. A, *infra,* 24a), the Commission and the United States expressly limited the arguments and discussions in their brief to the single issue (the labor cost issue) raised by petitioners.[14]

In these circumstances, we submit that the court's resolution of this issue contravenes important principles of judicial review of agency action. Thus, except for jurisdictional issues or extraordinary circumstances, this Court will review only those issues presented by the petitioner (See, e.g. *Stone* v. *Powell,* 428 U.S. 465, 481 n. 15 (1976)), and the courts of appeals appear to follow the same policy, which is based on considerations of basic fairness and judicial efficiency. *Harris* v. *Plastics Mfg. Co.,* 617 F.2d 438, 440 (5th Cir. 1980); *Simpson* v. *Union Oil Co.,* 411 F.2d 897, 900 (9th Cir.), rev'd on other grounds, 396 U.S. 13 (1969). For reviewing courts to reach and decide issues not raised by the petitioner or appellant would either effectively deprive respondents and appellees of an opportunity to respond or compel them to brief and defend every conceivable issue that might occur to the court. Neither result would be helpful to the courts or conducive to orderly and efficient judicial review.

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[14]Thus, the federal respondents stated (Br. at 12):

> Although the Commission's determination that the public convenience and necessity permit the abandonment was based upon weighing and valuing a number of factors, petitioners have limited their challenge to the Commission's decision to a single item with respect to the cost side of the equation. Accordingly, we shall limit our defense of the Commission decision to that issue.

In this case we believe we properly limited our responsive brief to the single labor cost issue that the petipetitioners' brief had raised and argued. By reaching out and deciding another issue, the court of appeals in effect penalized the Commission for properly tailoring its response.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the errors in the opinion of the majority of the court below, as laid bare in the dissenting opinion of Judge Adams, are so plain that this Court might properly consider summary disposition on the merits under Rule 23.1.

Respectfully submitted.

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AUGUST 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-1185

City of Cherokee, Rock Rapids Community Affairs Corporation, Farmer's Co-Op, Archer Co-Op, Calumet Feed Service, K-F Motors, Metz Baking Company, Ray Halder AGG Lime Service, Rowena Elevator & Mill, L.C. Burkhalter and M.S. Stuckey,

Petitioners,

v.

Interstate Commerce Commission and United States of America,

Respondents,

and

Illinois Central Gulf Railroad Company,

Intervenor-Respondent.

On Petition for Review of Order of Interstate Commerce Commission.

Submitted: October 15, 1980
Filed: February 12, 1981

Before HEANEY, ADAMS,* and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

*The HONORABLE ARLIN M. ADAMS, United States Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

On February 2, 1980, the Interstate Commerce Commission (Commission) rejected the recommendation of its Administrative Law Judge and authorized the Illinois Central Gulf Railroad Company (ICG) to abandon over 96 miles of track between Cherokee, Iowa, and Sioux Falls, South Dakota—the Sioux Falls District line. After a thorough review of the record, we find that the Commission failed to evaluate ICG's application for abandonment pursuant to the proper statutory standards. Specifically, we hold that the Commission erred by failing to properly balance the competing benefits and burdens of all interested parties, as it was required to do by statute. We also determine that the Commission erred in failing to treat certain train crew wages as "unavoidable costs" when it made its economic computations. We reverse the order of the ICC and remand the case to the Commission to reconsider its earlier order.

I

ICG is a land grant railroad with main lines between Chicago and the Gulf of Mexico. ICG was founded 130 years ago; in 1888, it purchased the Sioux Falls District line from another railroad. In 1962, ICG formed I. C. Industries to acquire, develop and control non-rail business. In 1968, I. C. Industries embarked on a course of substantial diversification which resulted in the formation of five discrete groups: commercial products, consumer products, real estate, financial and transportation. Today, ICG is the wholly owned subsidiary of I. C. Industries.

By 1977, I. C. Industries reported record sales and earnings with a net income of nearly $79 million. Although the transportation group produced thirty-six percent of the revenues of I. C. Industries, only four percent of its pretax income was attributable to this group. On the other hand, the commercial and consumer groups contributed seventy-seven percent of I. C. Industries' pretax income, marketing such products as Pepsi-Cola, Bubble Up, Dad's Root Beer and Midas Mufflers. I. C. Industries has indicat-

ed that these consumer products are becoming the foundation of the long range structure of the conglomerate. Recently, I. C. Industries revealed to its stockholders that, in all likelihood, ICG will be merged or sold at some future date.

The Sioux Falls District line has been used in the past to transport light loading traffic, primarily merchandise shipped in trailers on flat cars ("piggyback traffic") and fresh meat. However, no fresh meat has been transported over the line since December 10, 1977. On that date, ICG received an effective cancellation of its tariff on fresh meat moved in its refrigerated trailers. Less than three weeks later, it filed an application for abandonment.

In 1977, prior to cancelling its fresh meat tariff, ICG moved approximately 30,000 tons of meat traffic. The record indicates that in that year, ICG's largest fresh meat shipper was slowed by a labor strike. The record also indicates that ICG's refrigerated meat cars needed repair or replacement at the time the tariff was cancelled. Grain has been moved on the line in recent years but not in substantial amounts. Some small grain shippers have indicated that they foresee an increasing need for ICG's smaller grain cars.

The Sioux Falls District line has historically been a high speed line, with a maximum freight train speed of 40 m.p.h. for most of its distance, with the exception of a stretch slowed to 30 m.p.h. There is no present need to rehabilitate the track of the Sioux Falls District line. It appears, however, that two bridges along the line will need repair and that the cost of such repair will be approximately $121,540.

II

The Initial Decision of the ALJ

ICG filed its application for abandonment on December 27, 1977, and the case was assigned to Administrative Law Judge

Isabelle R. Cappello for hearing. The ALJ conducted hearings in May and October, 1978. After a careful review of the entire record, she issued her well reasoned opinion denying ICG's application. Recognizing that under the current law the railroad had the burden of establishing that the "present or future public convenience and necessity" required the abandonment of the line, the ALJ ruled that the applicant-railroad had failed to meet this burden. *See* 49 U.S.C. §10904(b)(Supp. II 1978).

In reaching this conclusion, the ALJ weighed the competing benefits and burdens that would ultimately result from abandonment. In essence, she compared the burden that continued operation would impose on the carrier with the adverse effects that abandonment would level upon the shippers and local communities who depend upon the continued operation of the line. *See Chicago & Eastern Illinois R. Co.—Abandonment*, 354 I.C.C. 789, 795 (1978). She rested her opinion on four major points: (1) the line was making a positive contribution to ICG; (2) the carrier's benefit in reinvesting its capital in a more lucrative market was outweighed by the devastating effect abandonment would have on the community; (3) denying abandonment would secure environmental benefits to the affected communities; and (4) ICG made no commitment to funnel the monies it would realize upon abandonment back into ICG's other rail lines.

In assessing ICG's burden of continued operation, the ALJ properly followed the direction of the statute and the Commission's regulations, and compared the revenues attributable to the Sioux Falls District line with the "avoidable cost" of continued operation of the line. She determined that the revenues attributable to the line and the avoidable cost of operating the line for the years 1975-1977 were:

	1975	1976	1977 (9 Mos.)
Revenues	$2,153,584	$1,734,875	$1,298,584
Costs.....	$1,766,393	$1,490,341	$1,180,385
Contribution	$ 387,191	$ 244,534	$ 118,199

The ALJ arrived at these cost figures by deducting from ICG's overall cost of operation those sums attributable to the wages (including health & welfare and payroll tax additives) of the trainmen and train enginemen who run the Sioux Falls District line. The ALJ reasoned that since an enforceable collective bargaining agreement obligated ICG to continue to pay the wages of the Sioux Falls District's two crews indefinitely, regardless of whether the trains moved, this expense was not avoidable upon abandonment. She also deducted those sums attributable to property taxes, reasoning that unless and until the railroad received firm offers for its real estate holdings, it would continue to have to pay property taxes and, therefore, this cost would not be avoided upon abandonment.[1]

The ALJ stated that ICG's cancellation of its fresh meat tariff directly resulted in greatly diminishing traffic over the Sioux Falls District line; this suggested that ICG was artificially building a case for abandonment. Accordingly, she decided that any economic loss suffered by ICG, as a result of the cancellation of its fresh meat tariff, should not be included in the weighing formula.

Administrative Law Judge Cappello noted that the total liquidation value of the Sioux Falls District line was $6.1 million, and that even at a modest nine percent rate of return, ICG could recognize nearly $560,000 yearly on its investment base in the line. She determined that the real reason that ICG sought to abandon the Sioux Falls District line was so that it could divest itself of its holdings in the line and reinvest the realized sum in a more profitable enterprise. Because the carrier made no commit-

[1]The deductions relative to wages were:

1975	1976	1977 (9 Mos.)
$191,237	$236,897	$189,430

The deductions relative to property taxes were:

1975	1976	1977 (9 Mos.)
$ 71,725	$ 60,678	$45,509

ment to reinvest the monies in its other rail lines, she concluded that the benefit of the sale would never be shared by ICG's other rail lines or interstate commerce.

The ALJ considered rate of return on the investment base of the line as one side of the balancing process. She, however, weighed this cost to the carrier against the cost of abandoning an "irretrievable transportation corridor" to the communities and shippers that depend upon ICG's Sioux Falls District line. The ALJ noted that the burden to the affected communities would be significant and would, in fact, be shared with commerce generally. The ALJ's findings in this regard, supported by substantial evidence in the record, may be summarized as follows:

> (1) Metz Bakery, South Dakota's largest commercial bakery, has a spur track that connects to the Sioux Falls District line. If the line were abandoned, Metz Bakery would need to convert its plant in order to receive flour by truck at a much inflated cost. This cost would, of course, be passed on to the consumer at the retail level.
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> (2) Jones Mill and Flour, a small elevator at Rowena, South Dakota, has consistently used small hopper cars on the Sioux Falls District line. If ICG were to abandon its line, it would result in Jones Mill and Flour shipping its grain by truck at an increased cost of twenty-nine cents per bushel for soybeans, twenty-three cents per bushel for corn and over seven cents per bushel for oats.
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> (3) Citizens of Cherokee, Iowa, opposed ICG's application for abandonment, arguing that it was the area's "last and best line." The other rail carriers that service points on the Sioux Falls District line and transport goods between Sioux Falls and Chicago are more circuitous. The CNW takes four days to make the trip, Burlington Northern three days, and the Milwaukee Road four to seven days. ICG provides overnight service to the same points. The ALJ also noted that the Milwaukee Road is in bankruptcy and that CNW's financial condition is precarious, at best. Furthermore, she stated that it was not wholly clear from the record whether

any carrier other than ICG could handle the piggyback traffic that travels the Sioux Falls District line.

(4) Iowa citizens testified about their need for continued fertilizer shipments along the line proposed for abandonment. Shipping by truck would result in raising the price of fertilizer by $7.00 per ton. One shipper testified that there is a serious shortage of trucks available for hauling fertilizer in the area. One Iowa fertilizer dealer, located on the Sioux Falls District line, Farmer's Co-Op., introduced testimony that it had just completed a 1,200-ton fertilizer storage structure. The Co-Op, which has 268 members, intended to fill the tank twice yearly; the structure's capacity is equivalent to twenty-four 50-ton railroad cars. The Co-Op views abandonment of the line as a disaster.

(5) Burt's Farm Service is a fertilizer and chemical supplier located on the Sioux Falls District line. No other rail carrier serves this shipper; nearby lines of CNW are in disrepair and cannot provide this shipper with assistance.

(6) Ray Halder runs an agricultural lime spreading business. He receives approximately fifty carloads of lime at Calumet from Fort Dodge, Iowa, over the Sioux Falls District line. Abandonment of the line would necessitate Halder's relocating at substantial expense.

(7) The Rock Rapids Community Affairs Corporation developed an industrial site on the Sioux Falls District line and paid for a rail spur. Since the community lost the Rock Island line by abandonment, continued operation of ICG's line would most likely attract industry to the site and increase ICG's revenues as the only available rail carrier.

In the end, the ALJ determined that the scales tipped in favor of those who protested the abandonment. While it would be in ICG's economic interest to reinvest its capital in some more lucrative market, she concluded, "it would not be in the public interest to sacrifice an irretrievable transportation corridor to such busi-

nesses as I. C. Industries currently plans for its structure."[2] Accordingly, she issued an order denying the railroad's application for abandonment.

The Commission's Decisions

An administrative appeal was taken from the decision of the ALJ to Division 1 of the Commission. The panel essentially adopted the ALJ's factual findings but arrived at a contrary conclusion, thus reversing the order of the ALJ and granting the abandonment. The rationale of the panel rested, basically, upon its determination that labor costs and property taxes are avoidable costs as a matter of law. The panel ruled that the Commission had neither the expertise nor the responsibility to interpret private labor-management agreements. The panel further stated: "[n]or can the existence of such a private agreement operate to effect Commission consideration and determination of questions of public convenience and necessity."[3] The panel ruled that

[2]Neither the ALJ nor the Commission specifically addressed the question of opportunity costs. This case was tried to the ALJ and her order was entered (as was the panel's decision) well before the Commission issued its recent policy statement on the use of opportunity costs in abandonment proceedings. At the hearing before the ALJ, no evidence was offered or received on this issue. We are, therefore, not faced with the question raised in *Missouri Pacific R. Co. v. United States*, 625 F.2d 178 (8th Cir. 1980), in which an ALJ refused to permit a carrier to introduce evidence of opportunity costs. Since ICG chose not to produce evidence of opportunity costs below, it will not be allowed to do so now for the first time on appeal. We express no opinion on whether the Commission's policy statement concerning the use of opportunity costs in abandonment proceedings is inconsistent with the Commission's statutory authority or otherwise in conflict with the Interstate Commerce Act, 49 U.S.C. §§ 10903-10905 (Supp. II 1978).

[3]In support of its position, the panel cited its own decision in *Baton Rouge Bus Co.—Abandonment*, 275 I.C.C. 1 (1949), and also *Burke County Ga. v. United States*, 206 F.Supp. 586 (S.D. Ga. 1962).

In *Baton Rouge Bus Co.—Abandonment, supra*, the protestants of an abandonment application argued that the Commission was without jurisdiction to consider the application because the carrier had privately

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property taxes were avoidable costs upon abandonment, even though ICG had received no firm offers for its real estate holdings, because it could be assumed that ICG would divest itself of these holdings within a reasonably short period of time.

In addition, the panel rejected the ALJ's conclusion that ICG could recapture its meat traffic and increase its grain traffic, stating that such a conclusion was speculative and not supported by the record. It agreed that abandonment would cause some adverse environmental effects, but held that these were not sufficient to offset the economic benefits that would accrue to ICG and in-

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agreed to continue operating the line proposed for abandonment. The Commission correctly disagreed, reasoning that its jurisdiction is controlled by Congress and not by any private contractual arrangements. *Baton Rouge Bus Co.—Abandonment, supra*, 275 I.C.C. at 5.

In *Burke County, Ga. v. United States, supra*, protestants of an application for abandonment asserted that the applicant-railroad should be estopped from securing approval of its plan to abandon because the railroad had given oral assurances to certain affected communities that it would not abandon the line that served their needs. In affirming the Commission's order granting the abandonment, the court stated, "[i]f such agreements operated to prevent the Commission from authorizing abandonment even when the public convenience and necessity favored such authorization, the sole test for abandonment * * * would be thwarted." *Burke County, Ga. v. United States, supra*, 206 F.Supp. at 588 (citation omitted).

It is clear that neither of these cases are controlling here. *Baton Rouge* and *Burke County* dealt with private agreements for *continued service*, and concerned the effect, if any, such agreements have upon the Commission's congressional directive to authorize abandonments when the public convenience and necessity requires such. This case does not raise that issue. Here, the protestants do not argue that the collective bargaining agreement restricts the ICC's jurisdiction, nor do they contend that the railroad is estopped from filing an application for abandonment. Furthermore, the agreement does not require continued operation of the line. The collective bargaining agreement provides that, notwithstanding abandonment, ICG is bound to indefinitely pay the wages of the Sioux Falls District's two crews. The protestants merely argue that, in assessing the benefits of abandonment to ICG, the Commission may not properly treat these wages as benefits, *i.e.*, avoidable upon abandonment.

terstate commerce through abandonment. Finally, the panel dismissed, without visible analysis, the ALJ's findings regarding abandonment's burdens on the community.

The protestants petitioned for administrative review of the decision of the Commission, Division 1. The petition was granted and the Commission affirmed the panel's decision. The full Commission, adopting the rationale of the panel, determined that: (1) the interpretation of a private agreement was not within the scope of the ICC's expertise or responsibility; (2) a private agreement could not control the Commission's determinations regarding public convenience and necessity; and (3) in assessing an application for abandonment, the Commission must compare the revenues attributable to the line with the cost of operating the line as a going concern. In this way, any and all costs of operating the line—even those that could not be avoided upon abandonment—would be compared to the revenues attributable to the line. Furthermore, the Commission redefined the term "avoidable cost" as joint cost, *i.e.*, a cost borne in part by another revenue-raising entity. The Commission reasoned that since the Sioux Falls District line was the only affected revenue-raising entity, all the costs of operation had to be attributed to the line proposed for abandonment and no other. Therefore, since another revenue-raising entity was not available to incur a portion of the costs of operation, there were *no* unavoidable costs. Accordingly, after adjusting the three years' data available, the Commission determined that ICG's Sioux Falls District line was not realizing a profit and authorized abandonment.

III

We begin by noting that the scope of our review of an order of the Interstate Commerce Commission is narrow. *North Dakota State Wheat Comm'n v. United States*, 565 F.2d 621, 626 (8th Cir. 1977). Nevertheless, we are required to thoroughly review

the entire record and carefully examine the Commission's conclusions to determine whether its findings are supported by substantial evidence in the record as a whole, and whether proper legal standards were correctly applied. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-416 (1971); *Burlington Northern, Inc. v. United States*, 549 F.2d 83, 88 (8th Cir. 1977). We note that

> [a] court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia." *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272, 88 S.Ct. 929, 935-936, 19 L.Ed.2d 1090 (1968).

Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 850 (D.C. Cir. 1970) (footnote omitted). *See North Dakota State Wheat Comm'n v. United States, supra*, 565 F.2d at 627; *Burlington Northern, Inc. v. United States, supra*, 549 F.2d at 88-89. *See also Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971). *See generally* B. Schwartz, Administrative Law § 204 (1976).[4]

IV

The two dispositive questions raised in this case are whether the Commission correctly included train and engine crew wages as

[4] Our determination to engage in a searching inquiry of the record to find substantial evidence supporting the Commission's action is required in part because, first, the Commission rejected the result reached by its Administrative Law Judge, and, second, the Commission has admitted that its approach to this area of the law is in a state of confusion. *See Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

"avoidable costs" in granting ICG's application for abandonment, and whether the Commission properly balanced the interests of the carrier and the affected communities before it authorized abandonment.[5]

Section 1(18) of the Interstate Commerce Act, amended as § 1a and recodified as 49 U.S.C. §§ 10903-10905 (Supp. II 1978)[6] controls this case. The statute provides in relevant part:

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission * * * may (1) abandon any part of its railroad lines * * * only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

49 U.S.C. § 10903(a) (Supp. II 1978).

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[5]We affirm the Commission's decision that property taxes may be treated as avoidable costs.

[6]In 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act (4-R Act) Pub. L. No. 94-210, 90 Stat. 31 (1976); the Act brought about a significant change in the law governing the abandonment of rail lines and discontinuance of service. Before the 4-R Act, the statutory provisions regulating this area were intermingled throughout §§ 1(18)-(22) of the Interstate Commerce Act. The statutory changes reflected in the 4-R Act were codified as 49 U.S.C. § 1(a), and recodified as 49 U.S.C. §§ 10903-10905 (Supp. II 1978). The new Act affected abandonment proceedings in three significant respects. First, it expanded the type of public notice that a carrier must post prior to abandoning a line. Second, it provided that states or local communities, as well as shippers who qualify as significant users of a line, could offer financial assistance to a carrier who proposes to abandon a line and, thus, keep the line in operation. Finally, very strict time limits were imposed upon the parties to the abandonment proceeding and also upon the Commission in its processing of the abandonment application. *See generally* Johnson, *The Railroad Revitalization and Regulatory Reform Act of 1976*, 45 I.C.C. Practitioner's J., 27 (1977).

The Act demands that the Commission, in determining the present or future public convenience and necessity, balance the benefits and burdens of abandonment which are ultimately distributed between the carrier, the protestant communities and shippers, and interstate commerce generally. In *Colorado v. United States*, 271 U.S. 153 (1926), the Supreme Court established the basic outline of the statutory scheme:

> The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce.

Id. at 168 (citations omitted); *Missouri Pacific R. Co. v. United States*, 625 F.2d 178, 180 (8th Cir. 1980). *See also Chicago & N.W. Transp. Co.—Abandonment*, 360 I.C.C. 647, 651 (1980); *Seaboard Coastline R. Co.—Abandonment*, 360 I.C.C. 257, 259 (1979).

In November, 1976, the Commission issued its regulations governing abandonment proceedings. The regulations set forth the basic procedural guidelines for abandonment proceedings. *See Abandonment of Railroad Lines and Discontinuance of Service*, Ex Parte 274 (Sub. No. 2), 354 I.C.C. 251 (1976) (hereinafter 49 CFR § 1121 *et seq* (1979)). In addition to carrying the burden of proving that abandonment is in the public interest, the regulations require the carrier to satisfy a lengthy set of procedural prerequisites. They also require the carrier to present specific and accurate cost/revenue data. The Commission uses this data to compare the revenues attributable to the line with the avoid-

able cost of operating the line, mindful that the carrier should recognize a reasonable rate of return on the value of its line. *See Texas & Pac. Ry Co.—Abandonment*, 360 I.C.C. 31, 35-36 (1978); 49 C.F.R. §§ 1121.40-47 (1979). *See generally* Johnson, *The Railroad Revitalization and Regulatory Reform Act of 1976*, 45 I.C.C. Practitioner's J. 35-47 (1977).

V

1. The train crew wages are not avoidable costs.

ICG presented to the ALJ the cost/revenue data required by the regulations. All parties agree that the ALJ's financial data is accurate; the dispute is whether certain crew wages were permissibly deducted from the "costs" side of the formula as "unavoidable." As noted, the ALJ reasoned that, on the basis of the record before her, the wages of two train crews would have to be paid indefinitely as a result of a collective bargaining agreement between ICG and the crew's statutory bargaining representative, regardless of whether the Sioux Falls District line were abandoned.[7] Applying the statutory definition of "avoidable cost"—"all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the

[7]M. S. Stuckey, a representative of the United Transportation Union, testified without equivocation that labor contracts between the railroad and the union required the carrier to assign and pay wages to two crews between Cherokee, Iowa, and Sioux Falls, South Dakota:

> Judge Cappello: Let me see if I understand this. Is it your position that under this agreement the railroad is going to have to assign two crews between Cherokee and Sioux Falls even though the line is abandoned and even though the employees have been placed elsewhere on the line?
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> The Witness: Your Honor, those were the preexisting conditions at the beginning of the turn of the century, and the company any time—and that's the company's obligation, to—
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> Judge Cappello: (interrupting) Is your answer yes to my question?
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> The Witness: The answer is yes.

The only indication to the contrary in this record is an unsworn, unsupported denial by the carrier's attorney.

transportation was provided were abandoned * * *." 49 U.S.C. § 10905(a)(1) (Supp. II 1978)—she concluded that the crew's wages could not be considered "avoidable." After making the proper adjustments, she discovered that the line was making a positive contribution to ICG (*i.e.*, the branch's revenues exceeded its cost of operation).

In reversing the decision of the ALJ, the Commission reasoned that the line had to be viewed as a going concern and that as such it would be irrational not to consider wages as one of the costs of operating the line. The Commission further stated that the concept of an avoidable cost is appropriate only when the carrier's costs are shared between two or more revenue-producing operations. The Commission explained that when one of the line's operations is abandoned and the other continues, then the cost of the continued operation is "unavoidable" and may not be treated as a cost in the revenue-cost formula. It concluded there were no joint costs in this case and, therefore, all costs were avoidable upon abandonment. The Commission erred in so holding.

Avoidable cost is related to the concept of incremental cost. The two terms are distinguishable in that the former is usually applied to retractions in service. Consider the following example:

> Suppose a railroad has just been faced with the proposition of discontinuing a service which obligates it to spend $100 next year and $200 two years from now, but if service were discontinued, its obligation would be $25 per year. The avoidable cost would then be the present value of $75 ($100–$25) discounted one year plus $175 ($200–$25) discounted for two years.

Price & Berardino, *Defining Economic Terms Used in the Railroad Revitalization and Regulatory Reform Act*, 9 Transp. L. J. 133, 154 (1977).

In purely economic terms, avoidable costs are an empirical measure of marginal costs that decrease through reductions or

cessations in output. In the industry, avoidable costs are related to "cash outlays that occur through time." *Price & Berardino, supra* at 155. In this way, avoidable costs are like cash flow statements that reflect cash changes attributable to the elimination of an asset or a particular service. *Id.* Accordingly, by definition, "[a]voidable costs are equal to the savings in resources due to the elimination of a particular activity." *Id.* at 156.

We feel the Commission was obliged to make its economic computations using the terms defined by Congress as its guide. It was not authorized to redefine the term "avoidable cost" as synonymous with "joint cost," and end its discussion there. If the Commission had used the statutory definition of avoidable cost, it would have concluded, as the ALJ properly did, that the wage costs must not be considered avoidable upon the elimination of the Sioux Falls District line.

2. The Commission failed to properly weigh the competing burdens/benefits of both the carrier and the affected communities.

The ALJ recognized that if the line were abandoned and all the properties sold, the money thereby realized could be invested in a more lucrative market, and ICG would realize a significant return on its capital investment in the Sioux Falls District line. She did not believe, however, that this factor should necessarily be determinative of the entire case. She correctly reasoned that Congress intended this factor to be measured against the burden that abandonment would impose on the affected communities and shippers. 49 U.S.C. §§ 10903-10905 (Supp. II 1978). The Commission stated in substance that if the carrier could not operate the branch line as a profitable going concern (and if it could turn a greater profit through abandoning the line and selling its property holdings), then abandonment would be permissible.

The ALJ was right and the Commission was wrong. Congress did not intend for the Commission to authorize abandonment of

particular rail lines solely because the carrier's capital investment in the line could be more profitably put to work elsewhere. Congress intended that the Commission determine the degree and severity of the benefits and burdens which abandonment would occasion to all affected parties. The Commission does not have the authority to modify the measuring mechanism mandated by Congress.

Although we think the ALJ correctly complied with the statute and properly balanced the competing interests of all affected parties, we cannot be called upon to affirm her decision on the basis of our independent review of the record. We have no alternative here but to remand this case to the Commission with directions to properly balance the benefits and burdens that would inure to *both* the carrier and the communities upon either abandonment or forced continued operation of the line. We further direct the Commission to articulate, with precision, its conclusions in this regard and issue an order that is capable of proper review by this Court."

ADAMS, Circuit Judge, dissenting.

Although I share the majority's concern for the Iowa-South Dakota region whose economic future is clouded by proposed railroad abandonments, I nevertheless find myself compelled to

"We are mindful of the fact that several proposals for railroad deregulation were introduced in the 96th Congress. On March 27, 1979, the Administration's proposals for regulatory reform in the rail industry were introduced in the Senate as S. 796, 96th Cong., 1st Sess., 125 Cong. Rec. § 3498 (1979). Similar proposals were introduced in the House on June 21, 1979, as H.R. 4570. H.R. 4570, 96th Cong., 1st Sess. (1979). The bills, which differed only in minor respects, essentially proposed the repeal of the present requirement that the ICC consider the "serious, adverse impact on rural and community development" in determining the public convenience and necessity. The Administration's proposal suggested that a certificate authorizing abandonment issue when: (a) there are no objections filed to the application, (b) the line's revenues do not exceed the avoidable cost of providing service on the line plus an

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dissent. For today's opinion rests on what I perceive to be an intrusion by the judiciary into an administrative agency's realm of expertise and policymaking, as well as a misunderstanding of the agency's economic analysis of the proposed abandonments.

I part company from three aspects of the majority opinion: (1) the scope of review, not as articulated, but as actually engaged in; (2) the definition and application of the statutory term "avoidable costs"; and (3) the propriety of our addressing an issue that was not raised by the parties.

While I agree with the majority's statement that the scope of our review of an order of the Interstate Commerce Commission (the Commission), is limited to a determination whether the Commission's findings and conclusions are supported by substantial evidence on the record as a whole, *Illinois Central R.R. Co. v. Norfolk & Western Ry. Co.*, 385 U.S. 57 (1966); 5 U.S.C. § 706(2)(E)(1976), the majority appears to have transgressed this acknowledged restriction. As this Court recognized in one of the first cases to be reviewed under the recent legislation permitting petitions from agency orders to the court of appeals:[1]

> In this circuit a petition for review of a Commission's order will be denied on a summary basis when the order is based on

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adequate return on capital attributable to the line, and (3) the ICC finds that the benefit to the railroad in reinvesting its capital in other more lucrative markets exceeds the detriment to the protestants of the abandonment application. *See generally* Note, *Proposed Regulatory Reform in the Area of Railroad Abandonment*, 11 Transp. L. J. 213 (1979).

Notwithstanding present support in Congress for railroad deregulation, we approach this case guided by the state of the law as it stands today. This case was originated under § 1(a) of the Interstate Commerce Act, recodified as 49 U.S.C. §§ 10903-10905 (Supp. II 1978). We are guided by that statute and our decision rests solely upon that statute.

[1]Pub.L.No. 93-584 §§ 5 and 7 (Jan. 2, 1975) (eliminating three-judge district court procedure for review of orders of the Interstate Commerce Commission). *See also* 28 U.S.C. § 2342.

> the evidence and supported by a rational judgment of the Commission. . . . It is rare that a Commission order is not based on relevant factors or that the exercise of its expertise can be termed such an abuse of discretion as to require reversal by the courts. That such limited review was the intent of Congress is clear.

Warren Transport Inc. v. United States, 525 F.2d 148, 151 (8th Cir. 1975).

Such a posture balances the responsibility to avoid judicial overreaching into areas of discretion and of policy choices that are vested by Congress in the Commission, with our primary duty to review agency decisions so as to ensure conformity with pertinent legal requirements.

It is not, however, within our province to choose between discrepant decisions by the ALJ and the Commission, nor, as the majority seems to suggest, to alter our level of review because the two decisions are contradictory. *See* maj. op. at n.4. The Commission is in no sense bound by the ALJ's decision. In fact, scrutiny of the ALJ's actions is only incidental to our review of the Commission's decisions, *see* 28 U.S.C. §§ 2321, 2342, 2344. Except on matters of credibility, which are not in issue here, the ALJ's conclusion is to be accorded little deference provided the Commission has made an independent evaluation supported by substantial evidence. Thus, as the First Circuit noted in an analogous context, "the question before us is not whether the ALJ's approach was, in our view, better, but simply whether the Commission's method of computing the extent of the carriers' injury was rational." *Bangor & A. R. Co. v. I.C.C.*, 574 F.2d 1096, 1110 (1st Cir. 1978), *cert. denied*, 439 U.S. 837.[2] The majority's proclivity to weigh the desirability or correctness of the ALJ's decision against that of the full Commission, accordingly, would appear to be unauthorized.

[2]This portion of the *Bangor* decision involved the calculation of a damage award against a carrier whose solicitation campaign on behalf of one line unduly prejudiced other connecting lines in the distribution of traffic.

Secondly, I differ from the conception of avoidable costs that is developed in the majority opinion. Contrary to the majority's belief that "[t]he Commission further stated that the concept of an avoidable cost is appropriate only when the carriers' costs are shared between two or more revenue-producing operations," *ante* at 1229, I read the full Commission's decision to state exactly the opposite—that it is precisely when no shared or joint costs exist that avoidable costs are present. Conversely, when joint costs do exist many costs are not avoidable, for the elimination of one operation would leave unaffected the need to continue those costs to support the remaining operation. As the Commission declared, "every ongoing-out-of-pocket cost of a particular rail operation, that cannot be properly reallocated to any other revenue- producing operation [*i.e.* is not a shared or joint cost] must be considered as part of the cost of the operation proposed for abandonment." 363 I.C.C. at 96. Rather than being synonymous with joint costs, as the majority contends, *ante* at 1229, avoidable costs are defined in opposition to joint costs.

The consequences of my disagreement with the majority on this issue are twofold. Initially, I do not believe that the Commission deviated from the statutory definition of avoidable cost. *Cf.* maj. op. at 1229. As the majority indicates, the recent Railroad Revitalization and Regulatory Reform Act (4-R Act) Pub.L. No. 94-210, 90 Stat. 31 (1976), now codified at 49 U.S.C. § 10903-10905 (Supp. II 1978), provides the governing law for abandonment of rail lines. Section 10905(a) defines "avoidable cost":

> (1) "avoidable cost" means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—
>
> (A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

The Commission's definition of avoidable costs properly reflects the congressional meaning. Instead of parroting the statutory language the Commission, admittedly, spoke of ongoing out-of-pocket costs rather than "outflow incurred." But this did not distort the statutory definition. Nor did the illustration of joint costs do more than illuminate why avoidable costs become problematic in areas of overlapping operations. In fact, the Commission's finding that it "would allow as an avoidable cost . . . only those costs which it was shown would not have to be continued [to support some other service]," 363 I.C.C. at 96, is clearly consonant with the statutory language.

Further, based on the record before us and in light of my view that the Commission rationally interpreted the meaning of the term avoidable costs, I conclude that the Commission did not err in holding the crew's wages avoidable upon abandonment. *Cf.* maj. op. at 1229. All the parties concede that Commission regulation 49 C.F.R. 1121.42 expressly contemplates engine and train crew wages to be avoidable costs so long as they "are incurred solely as a result of the continuation of rail freight service on the branch." The union and petitioners, however, maintain that their wages are not incurred *solely* on account of continued service. They argue that under the collective bargaining agreement—the "tabulated local rule"—the ICG is compelled to pay their wages indefinitely, regardless of whether the rail line exists or is abandoned.

Bearing in mind that our review focuses on whether there is a rational basis for the Commission's conclusion, not whether peti-

tioners and the ALJ's position might also be plausible, I do not find the Commission's analysis of the situation unsupported by the record. The Commission reasoned that the wages were an existing cost:

> Thus, even if it were clearly established that ICG would have to continue the wages of these two train crews for some period of time after shutting down operations . . . it still would not follow that their wages and fringe benefits should be left out of account in assessing the burden on ICG and on interstate commerce of requiring ICG to continue operations on the line.

363 I.C.C. at 97.

Next, the Commission noted that although the wages might have to be treated temporarily as deferred costs of the abandoned operation, such costs gradually would be eliminated. From the Commission's perspective, no one could contend "that [trainmen] will continue indefinitely to be paid for doing nothing. At most it will be until the local [labor] agreement is next renegotiated, or in the extreme imaginable case until these workers reach retirement age. Under even the most ironclad attrition agreement, attrition eventually takes place." 363 I.C.C. at 98 n.5. The final element in the Commission's determination that the wages were avoidable costs involved a policy choice. Underlying its assessment "that it would be improper to use the prospective imposition of labor protective provisions as an argument for ignoring present labor costs when considering the abandonment of a branch line," as the ALJ did, was the recognition that the consequent contorting of the profitability calculation would ultimately discourage such private agreements. That is, if attrition agreements or "tabulated local rules" were viewed as immutable and eternal, they would function to prevent adjustments in rail operations needed to reflect changed public demand as well as to keep railroads out of reorganization proceedings. The public interest would suffer and the objective of protecting labor would eventually boomerang—for carriers would refuse to enter such unrealistic arrangements.

On the record, the Commission's decision to treat crew costs as avoidable is supported by substantial evidence. The regulations define such costs as avoidable; the effect of the collective agreement was in question;[3] and the Commission's policy choice —seeking to balance the goal of stable employment with that of viable railroads, rather than sacrifice the latter to the former— was clearly within the realm of its expertise. There would appear to be nothing arbitrary in the Commission's reasoning that the possible existence of deferred wage costs is neither a valid basis for denying abandonment nor a ground for defining an otherwise unprofitable operation as profitable.

Moreover, I have difficulty understanding how the decision by the majority to uphold the Commission's determination that property taxes are avoidable costs, *see* maj. op. at 1227 n.5, may be reconciled with its decision to reject the Commission's complementary finding that wage costs are avoidable. As with crewmen's wages, the abandonment regulations specifically recognize real property taxes as avoidable costs. Again, the Commission adhered to the congressional definition of avoidable cost: "A cost is avoidable if it can with reasonable certainty be avoided within a reasonable time following abandonment." 363 I.C.C. at 100. And the Commission made explicit that "[t]he principles underlying our earlier discussion of avoidable wage costs are applicable here

[3]The old award decisions cited by petitioners, dating from 1955, 1941 and 1937 concededly guarantee pay for two crews on the line for every working day, regardless of whether the crews are actually used each day, but they do not begin to address any assertion that wages will be paid indefinitely despite cessation of service and abandonment of the line. *See* National Railroad Adjustment Board-First Division, Award 17194 (Docket No. 27306) (October 26, 1955) and National Railroad Adjustment Board-First Division, Award No. 5523 (Docket No. 11522) (March 19, 1941). The union admitted that the agreement did not contemplate abandonment. At most then, the union's testimony amounted to a claim that, given an abandonment, no immediate savings would be realized because the Sioux Line employees have the right to replace lesser-paid junior employees in other areas, or would fill existing vacancies. (P.Br. 1a-16a)

as well." 363 I.C.C. at 100. It is unclear how the Court can find identical principles and analysis permissible with respect to taxes and irrational with respect to wages. Insofar as the Court has failed to distinguish why the Commission's reasoning is appropriate for property taxes but not for wage costs, the agency will, in the absence of further explication, have difficulty on remand fulfilling the mandate "to articulate, with precision" the analysis underpinning its next determination.

As indicated above, I diverge from the majority on a third matter: the propriety of raising *sua sponte* an issue not addressed by the parties. My reluctance to expand judicial oversight is in this instance both informed by the statutory limitations on our scope of review and enhanced by the prospect of penalizing the Commission for properly limiting its response to the sole issue raised by petitioners. As the Commission itself noted, "although [our] determination that the public convenience and necessity permit the abandonment was based upon weighing and valuing a number of factors, petitioners have limited their challenge to the Commission's decision to a single item with respect to the cost side of the equation. Accordingly, we shall limit our defense of the Commission decision to that issue." (R. Brief at 12). Thus, concerns of both an institutional and of a due process nature heighten my disagreement, at the factual level, with the majority's holding that "the Commission failed to properly weigh the competing burdens/benefits of both the carrier and the affected communities." *Ante* at 1229.

Insofar as fulfillment of our obligation to review thoroughly the record as a whole,[4] has led the Court to hold that the Commission did not adequately consider the benefits and burdens of abandonment to the community, an objective perusal of the entire record indicates that the Commission properly performed the statutory

[4] *See Hilt Truck Line, Inc. v. United States*, 532 F.2d 1199 (8th Cir. 1976).

balancing act. It is undisputed that "whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development" is an essential ingredient of the statutory touchstone—whether "the present or future public convenience and necessity require or permit abandonment." 49 U.S.C. § 10903(a)(2). At a minimum, the Commission considered the impact on the community at two points in its order.

With respect to the future need for refrigerated meat service, the Commission affirmed the panel's conclusion that the ALJ's assumption about the recoverability of meat traffic was speculative and unrealistic. In doing so, the Commission relied on the inference that the present decline in demand for refrigerated services is likely to continue, and further noted that no testimony of need was offered by a shipper or prospective shipper. The Commission acknowledged that testimony of a demand for services would be highly probative but regarded the silence in the present proceeding as a reflection of minimal local need. Clearly, the impact on the community was an element in the determination. 363 I.C.C. at 102-03.

The Commission then stated that, "we see no basis for disturbing the panel's ultimate weighing of the factors of public convenience and necessity, which led it to conclude that abandonment should be permitted." This indicates an adoption of the panel's calculus which found that the adverse environmental factors enumerated by the ALJ (small increase in fuel consumption, noise and air pollution) and the economic burdens which abandonment would impose upon shippers and community development were collectively insufficient to offset the economic advantages to ICG and to interstate commerce which would result from an authorization of abandonment. When the panel's determination is combined with the environmental threshold assessment survey[5] adopted by the panel (and which found no negative im-

[5]In conjunction with an application for abandonment the Commission's section of Energy and Environment prepares an Environmental

(footnote continued on following page)

pact on industrial development), the record evinces substantial evidence, notwithstanding the ALJ's conclusion that abandonment seems more likely than not to have an adverse impact on rural development, to support the Commission.

Admittedly, the Commission's decision is grounded heavily on the effect that the abandonment or continuance would have on the economic well-being of the railroad. But this is not, as the majority hypothesizes, because the Commission believed "in substance that if the carrier could not operate the branch as a going concern . . . then abandonment would be permissible." *Ante* at 1229. As the Commission explicitly stated, this assessment was only one of the concerns of the abandonment regulations. 363 I.C.C. at 96. The economic burden on the rail carrier was addressed extensively simply because the salient question—whether crew wages were avoidable costs—was inextricably linked to the economic balance sheet of the railroad. Once the Commission agreed with the panel that the ALJ's mischaracterization of wages and property taxes improperly transformed the 1976 and 1977 years' operating losses of $53,000 and $117,000 into profit contributions of $184,000 and $73,000, it had no need to go further. Rather than duplicate the panel's cost-benefit balancing it was permissible for the Commission to adopt the panel's weighing of the relevant statutory factors. Only if the Commission had disagreed with the panel would there have been a need for a reworking of the benefit/burden calculation. In the present proceeding, there is no justification for a remand.

While either a wholehearted commitment to the economic viability of railroads or a more integrated approach to areas threatened by multiple abandonments might be preferable, and

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(footnote continued from previous page)
Threshold Assessment Survey (TAS) which can provide the basis for modifications or conditions on approval of an application. The TAS for the ICG's application concluded that this "abandonment proposal would not significantly affect the quality of the human environment."

might eliminate many of the problems implicit in this appeal, at present it is necessary to work within existing statutory definitions and a circumscribed scope of review that have been ordained by the Congress. Because I believe the majority trenches upon agency discretion and fails to grasp the appropriate relationship between avoidable and joint costs, and because I find substantial evidence to support both the panel's and the full Commission's assessment of avoidable costs and public convenience, I respectfully dissent.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1185 September Term, 1980

City of Cherokee, Rock Rapids Community Affairs Corporation, et al., *Petitioners,* vs. **Interstate Commerce Commission, et al.,** *Respondent.* and **Illinois Central Gulf Railroad Company** *Intervenor-Respondent.*	Petition for Review of Order of Interstate Commerce Commission.

This cause came on to be heard on petition for review of an order the Interstate Commerce Commission, appendix and briefs of the respective parties and was argued.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the Interstate Commerce Commission be, and it is hereby, reversed in accordance with the opinion of this Court.

And it is further ordered by this Court that this cause be, and it is hereby, remanded to the Interstate Commerce Commission for reconsideration consistent with the opinion of this Court.

February 12, 1981

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

No. 80-1185 September Term, 1980

City of Cherokee, et al.,

Petitioners,

v.

Interstate Commerce Commission, et al.,

Respondents,

and

Illinois Central Gulf Railroad Company,

Intervenor-Respondent.

Petition for Review of Order of Interstate Commerce Commission

The Court, having considered respondents' petition for rehearing and suggestions for rehearing en banc and being fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

April 9, 1981

APPENDIX D

F-9860

INTERSTATE COMMERCE COMMISSION

AB-43 (SUB-NO. 47)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABONDONMENT BETWEEN MILEPOST 0.0 AT CHEROKEE, IOWA AND MILEPOST 96.47 AT SIOUX FALLS, SOUTH DAKOTA, IN CHEROKEE, O'BRIEN, SIOUX, AND LYON COUNTIES, IOWA, ROCK COUNTY, MINNESOTA, AND MINNEHAHA COUNTY, SOUTH DAKOTA

Decided February 15, 1980

Upon administrative review, findings in prior decision served August 29, 1979 (not printed), authorizing the proposed abandonment affirmed. Train crew labor costs arising out of operation of a branch line which cannot be properly reallocated to other revenue producing operations must be considered avoidable costs of that branch line operation. Real property taxes which can be eliminated with reasonable certainty within a reasonable time following abandonment are properly included within avoidable cost calculations. Ad valorum real property taxes are not necessarily excluded from the category of avoidable costs. The burden of proof to which an applicant in an abandonment proceeding is subject does not impose unreasonable standards. Reasonable inferences can be drawn from evidence produced by an applicant who is in full compliance with Commission abandonment regulations, which inferences require affirmative evidence to rebut.

John H. Doeringer for Illinois Central Gulf Railroad Company.
T. Scott Bannister for Iowa Department of Transportation.
John C. Wiles for South Dakota Public Utilities Commission.
Gordon P. MacDougall for protestants and intervenors.
Marvin Wallace Miller and *Thomas M. Knebel* for intervenors in opposition.

DECISION

BY THE COMMISSION:

On September 18, 1979, a joint petition for leave to intervene in this proceeding as protestants was filed by the city of Cherokee, Farmer's Coop, Calumet Feed Service, K-F Motors, Rowena Elevator & Mill, Rock Rapids Community Affairs Corporation, Metz Baking Company, and Ray Halder Agg Lime Service. In

addition on the same data a separate petition for leave to intervene was filed by C.S. Agro Corp. In view of the prior participation of these petitioners as witnesses in this proceeding, we find good cause has been shown to permit these petitioners to intervene.

In a separate pleading also filed September 18, 1979, the city of Cherokee, Rock Rapids Community Affairs Corporation, Farmer's Coop, Archer Coop, Calumet Feed Service, K-F Motor, Metz Baking Company, Rowena Elevator & Mill, Ray Halder Agg Lime Service, L. C. Burkhalter, M. S. Stuckey, B. E. Hudson, and W. H. Canty filed a joint petition for administrative review of the decision of the Commission, Division 1, served August 29, 1979. C.S. Agro Corp. joined in the petition for administrative review. Illinois Central Gulf Railroad Company (ICG) filed a reply to the petition for administrative review on October 4, 1979.

Intervenors seek a determination that this proceeding involves a matter of general transportation importanee. They assert that the failure of division 1 to recognize the full impact of the "tabulated local rule" so as to exclude train and engine crew labor costs from the computation of avoidable costs was erroneous and in conflict with a prior ruling of division 2 in AB-43 (Sub-No. 42), *Illinois Central Gulf Railroad Company Abandonment in Greene, Monroe, Brown, Johnson, Morgan, and Marion Counties, IN* (not printed), decided December 20, 1978. They further assert that division 1 improperly included real property taxes as an avoidable cost and erroneously evaluated the propects for increased traffic on the line proposed for abandonment. They urge that the decision of division 1 which authorized the proposed abandonment be reconsidered and that the abandonment be denied.

In its reply ICG insists that the abandonment regulations of the Commission (49 CFR 1121) as they apply to this proceeding were correctly interpreted in the decision of August 29, 1979, and that the facts support the decision reached by division 1.

We have concluded that the two issues intervenors raise regarding avoidable costs, plus their general issue of burden of proof, present matters of general transportation importance justifying review by the full Commission, because of the large number of abandonment cases in which these and similar issues arise and the confusion and possible conflict between divisions and among Administrative Law Judges which appear to have developed concerning them. Upon such review, the Commission will affirm the conclusions of division 1. Intervenors' third specific issue, regarding future traffic prospects on the line, does not warrant further administrative review, and in this respect the petition for review will be denied. We also will not

disturb division 1's ultimate conclusion that abandonment of ICG's Cherokee-Sioux Falls branch, subject to specified conditions, accords with the public convenience and necessity and should be allowed.

Labor costs.—The intervenors contend that, as a result of the United Transportation Union's (UTU) local collective bargaining agreement with ICG (known as a "tabulated local rule"), the railroad will have to continue paying the wages of the two train crews in question even if it is permitted to abandon the Cherokee-Sioux Falls line. By their interpretation, ICG cannot require the present crews to relocate or accept other duties, and if they do so voluntarily it will still be required to assign two new crews to the line, whether operating or not. Thus, argue the intervenors, the wages and fringe benefits of these train crews are not "avoidable costs" of the branch-line operation. ICG vigorously disputes this interpretation of the agreement, contending that it will not continue to be applicable since ICG's entire Sioux Falls district is proposed to be abandoned.[1]

The Administrative Law Judge accepted the intervenors' argument and disallowed the wages and fringe benefits of the two train crews in her profit-or-loss calculations, thus turning the line's most recent years' operating losses of $53,000 (1976) and $117,000 (1977—9months), as calculated by ICG, into profit contributions of $184,000 and $73,000, respectively (on a capital liquidation value of $6.2 million). These adjustments, together with smaller but still significant adjustments as regards real property taxes (see below), led the Administrative Law Judge to conclude that the Cherokee-Sioux Falls line is profitable and that its continued operation will not be an unwarranted burden on ICG or on interstate commerce.

Division 1 reversed the Administrative Law Judge's findings and conclusions on this point, holding that the Commission's regulations, 49 CFR 1121.42, expressly provide for the inclusion of train crew labor costs in calculating the profitability of branch-line operations for abandonment purposes. The division further held that the effect of the regulations cannot be overcome by a private labor-management agreement such as the "tabulated local rule" here at issue, where the interpretation of the private agreement is in dispute, as it is here. The interpretation of such a private agreement is not within the scope of the Commission's expertise or

[1]A short 2-mile stretch of the 92-mile branch line will be leased to the Cherokee Industrial Corporation for use as an industrial spur line, but this in the applicant's view does not negate its argument.

responsibility, the division held, nor can such an agreement, particularly when in dispute, control the Commission's determination of questions of the public convenience and necessity.

We affirm division 1's decision on this issue, both for the reasons it gave and for another, even more fundamental reason.[4] One of the purposes of our abandonment regulations is to allow us to calculate, as objectively as the nature of the subject will permit, what effect the abandonment or nonabandonment of a particular rail operation will have on the economic well-being of the applicant railroad—keeping in mind that without profits a privately owned rail system such as ours cannot obtain capital to replace and renew its facilities, and thus cannot for long continue to carry on even the most essential of its public services. This purpose requires at a minimum that every ongoing out-of-pocket cost of a particular rail operation, that cannot be properly reallocated to any other revenue-producing operation, must be considered as part of the cost of the operation proposed for abandonment.

The concept for an "avoidable cost" is necessary because of the prevalence in railroading of joint costs—that is, costs which support two or more revenue-producing operations. When one of these operations is abandoned, the others must henceforth bear these costs since they cannot be eliminated. Thus, to cite a historical example, where an obviously profitable freight service and a questionably unprofitable passenger service were being operated over the same tracks, the Commission would allow as an avoidable cost of the passenger service only those track maintenance costs which it was shown would not have to be continued in order to support continued freight service.

Here, however, there is no possible issue of joint costs. The only service performed by the train crews in question is to operate trains over the Cherokee-Sioux Falls line. Their wages and fringe benefits cannot be reallocated to any traffic other than that transported over the line. If freight rates paid by shippers and receivers on the Cherokee-Sioux Falls line do not cover these wage costs, they will

[4] As noted above, intervenors contend that division 1's decision here is inconsistent with an earlier unpublished decision of division 2 in AB-43 (Sub-No. 42). We note, however, that in the later case the union's interpretation of the existing local labor agreement was not disputed by the applicant. Moreover, the resolution of the wage cost issue was plainly not central to the division's ultimate decision denying abandonment, since the division expressly noted that its decision would be the same even if the disputed wage costs were included. Nevertheless, to the extent that the cited decision may appear to hold that a local labor agreement whose interpretation is not in dispute may be introduced for the purpose of excluding wage and other costs from the "undue burden" profit-or-loss calculations in an abandonment case, that decision is overruled, along with any others of like import.

have to be borne by shippers and receivers elsewhere on ICG's system, to whom they make no contribution, or else by ICG's stockholders. This is precisely what is meant by a burden on the applicant and on interstate commerce.[3] Whether or not the burden is judged to the "undue" depends of course on additional factors which have been fully considered in this case. What concerns us here is that the burden exists and must be recognized.

Thus, even if it were clearly established that ICG would have to continue the wages of these two train crews for some period of time after shutting down operations on the Cherokee-Sioux Falls line, and that it could not immediately assign them to other duties pending a renegotiation of the local agreement, nevertheless it still would not follow that their wages and fringe benefits should be left out of account in assessing the burden on ICG and on interstate commerce of requiring ICG to continue operations on the line. The distortion of reality which results from doing so may be clearly seen in the initial decision. Having by her exclusion of these wage costs turned a clear operating loss into a "profit," albeit a small one in relation to the capital involved,[4] the Administrative Law Judge discusses in the final section of the initial decision (pp. 18-19) the fairness of requiring ICG to accept "a lower rate of return than nonrail properties might generate." But any positive rate of return on investment whatever is strictly imaginary when it results from ignoring the wage costs of operating the Cherokee-Sioux Falls or any other branch line.

Who is going to bear these costs? Surely they cannot be regarded as a gratuity by the railroad or its stockholders. The initial decision never even begins to answer that question, because it ignores these costs not only when finding the Cherokee-Sioux Falls line "profitable" but for all other purposes as well. Yet it is obvious that these costs cannot rationally be imposed upon ICG's other branch-

[3] As regards the ability of ICG's stockholders to bear the costs of unprofitable branch-line operations, we quote the following findings from the initial decision (pp. 2-3): In 1977, ICG had a net income after taxes of $3.3 million, on a stockholders' net equity of $693 million, for a return on equity of less than 0.5 percent. If real estate sales are excluded from profits, ICG in 1977 had a net loss from transportation operations of $23.9 million. No dividends have been paid since December 31, 1976. ICG is controlled by a conglomerate, ICG Industries, which also controls companies manufacturing and selling such consumer products ad Dad's Root Beer and Midas Mufflers. (No way has been suggested of making the consumers of these commodities, which are sold in a freely competitive market, bear the cost of unprofitable branch-line operations by ICG.)

[4] She found the net salvage value of the line to be $6.1 million, consisting of $3.6 million for land and $2.5 million for salvageable rails and other scrap. On this capital investment, the $118,000 she ultimately calculated as the line's contribution to profits in 1977 represents a rate of return of approximately 1.9 percent.

line operations—as we have seen, they are not joint costs in any true economic sense—nor yet on its only marginally profitable main-line operations.

In our view the only rational way these wage costs can be treated is as costs of the particular branch line whose abandonment is at issue. If the line is abandoned and it turns out that ICG is in fact required to go on paying these crews for a time[5] without being able to assign them any other duties, then their postabandonment wages will have to be treated as a deferred cost of the abandoned operation, since these costs cannot rationally be assigned to any other operation. The potential existence of such a deferred cost does not justify ignoring the present wage bill in assessing whether or not existing operations are profitable. If it is concluded that existing operations are unprofitable when wage costs are taken into account, the possible existence of a deferred wage bill simply means that the carrier will not be able to realize immediately the savings inherent in abandonment if permission to abandon is granted. But if permission to abandon is denied or postponed, not only will present costs and losses continue to be incurred, but the incubus of potential future deferred costs will continue to hang over the operation. In other words, the fact that the full savings from abandonment of a lossmaking operation may be deferred for a period of time is not a valid reason for refusing ever to start the period of deferral running.

In this respect there is a close analogy between the asserted effects of this local labor agreement, as interpreted by the intervenors, and the effects of the labor protective provisions that the Commission uniformly imposes in rail merger and abandonment cases. The Commission has long used its regulatory powers to ensure that the burden of needed adjustments in railroad operations does not fall with unreasonable harshness on railroad employees, and this policy is now strongly sanctioned and indeed mandated by statutory amendments to the Interstate Commerce Act in recent years. The invariable result of imposing labor protective provisions is to defer for a period of time some or all of the savings in labor costs which the affected carrier or carriers might otherwise be able to realize. Since these adjustments in operations or authority are normally proposed on the expectation that they will improve the profits or

[5] We say "for a time" because no one contends that they will continue indefinitely to be paid for doing nothing. At most it will be until the local agreement is next renegotiated, or in the most extreme imaginable case until these workers reach retirement age. Under even the most ironclad attrition agreement, attrition eventually takes place.

reduce the losses of the carrier or carriers involved, the imposition of labor protective provisions is thought to involve no unfairness to the carriers. However, the same analysis that we make above regarding "tabulated local rules" and similar private labor agreements demonstrates that it would be improper to use the prospective imposition of labor protective provisions as an argument for ignoring present labor costs when considering the abandonment of a branch line. That indeed would be unfair, and would needlessly sacrifice one statutory policy for another.

By the same token, since public policy supports the cushioning of the effects on employees of needed changes in rail operations of authority through protective provision, so likewise it is in the public interest to encourage private agreements which have a similar effect of stabilizing employment and protecting employees from sudden adverse changes. The existence of such agreements, however—whether called attrition agreements, "tabulated local rules," or any other designation—must likewise not be allowed to prevent those adjustments in rail operations and authority which are otherwise consistent with the public interest and are needed to keep our privately owned railroads out of the bankruptcy courts.[6]

Yet that is precisely the effect of the Administrative Law Judge's decision here to exclude train crew costs in calculating the avoidable expenses of the Cherokee-Sioux Falls line, following her acceptance of intervenors' interpretation of the local UTU-ICG labor agreement. An agreement having (arguably) the desirable effects of stabilizing employment and cushioning the shock of abandonment is thus turned into a source of completely imaginary "profits," on the basis of which ICG is to be deprived of relief from its burdensome service obligations on this little-used and (by any realistic definition) unprofitable branch line. We see this outcome as allowing one statutory objective to be totally sacrificed to another, rather than attempting to reconcile them, as we think the long-term public interest requires.

Real property taxes.—The Administrative Law Judge refused to allow the real property taxes assessed and paid on the right-of-way

[6] This does not, of course, mean that a true joint cost situation cannot be shown—a situation, that is, in which the services of a particular employee or group of employees presently support two operations, only one of which is to be abandoned, and in which it will be impracticable to assign significant new duties to the employee or employees who will have to be retained. Absent evidence of such a true joint cost situation, however, the applicant for abandonment is not required either to show that the employees working solely on the branch line at issue will actually be laid off following abandonment (which as we well know will rarely be the case), or to show precisely what their new duties will be. (See the discussion of burden of proof, below.)

of the Cherokee-Sioux Falls line as avoidable costs, on the grounds that no firm offers had been received for this property. She accordingly reduced the allowance for avoidable costs, and increased the supposed "profit contributions" of the line, by $61,000 in 1976 and $45,500 in 1977 (9 months). Division 1 reversed the initial decision on this issue, pointing out that the abandonment regulations specifically call for the recognition of real property taxes as avoidable costs, and that ICG's witness had testified without contradiction that it intended to sell the right-of-way upon abandonment. The division held that proof of a firm offer or offers for the properties is not a condition precedent to the recognition of real property taxes as avoidable costs.

We affirm the division's conclusion. It would be unreasonable to require an applicant to produce evidence of firm offers to purchase property it proposes to abandon, where the completion of the abandonment proceedings must necessarily result in a long delay in acting on such offers, and where in any event there is little reason to doubt that such property can be sold. The Administrative Law Judge was apparently concerned that, in the absence of firm offers, it is not completely certain that the applicant will be able to sell the property and thus terminate its liability for taxes on "Day One" following abandonment. That is not the test. A cost is avoidable if it can with reasonable certainty be avoided within a reasonable time following abandonment. Thus the fact that ICG might go on paying real estate taxes for some months or even years while awaiting a satisfactory purchase bid for some part or all of the property does not exclude these taxes from the category of avoidable costs. We find no basis in the record for any serious question as to the salability of the property in question;[7] and even if some particular portion were ultimately to prove unsalable for nonrailroad purposes, ICG could simply cease paying the taxes on that portion and allow it to be sold for taxes, thus terminating the out-of-pocket expense.

The principles underlying our earlier discussion of avoidable wage costs are applicable here as well. The right-of-way and other real property of the Cherokee-Sioux Falls line contribute nothing, so far as the record shows, to any other transportation operation of ICG, nor can they reasonably be borne by shippers and receivers whose

[7]We note that the Administrative Law Judge found no difficulty in placing a salvage value of $3.5 million on the real property in question (initial decision, p. 8). This necessarily implies its salability for nonrailroad purposes; otherwise the value would be zero.

goods do not move over the line. Thus any delay in terminating the expense of taxes on this property after abandonment, whether voluntary or involuntary, can only be treated as a deferred cost of the abandoned branch operation. The possible existence of such deferred costs, we have shown, is not a valid basis for denying abandonment, nor does it render "profitable" an operation which is otherwise unprofitable.

In their petition the intervenors assert a separate ground for disallowing a portion of these taxes different from that adopted by the Administrative Law Judge. They state that in South Dakota the taxes in question are ad valorem taxes, which they say "customarily are disallowed in line abandonment and service discontinuance proceedings." (Petition, pp. 7-8.) This represents a misunderstanding by intervenors. There is no special magic in the words "ad valorem" which take real property taxes out of the category of avoidable costs. Such taxes are not avoidable only where it is shown that, although in form local taxes on the value of property, they are actually assessed on the basis of statewide factors such as gross receipts which in the specific instance make it unlikely that the abandonment of a lightly used branch line will result in more than a *de minimus* reduction in the railroad's statewide tax bill. In the leading case on this point, *Chicago & N. W. Ry. Co. Abandonment,* 275 I.C.C. 759, 771 (1951), such a showing was clearly made. The record here discloses no such showing. Indeed, it affirmatively shows the contrary. The Cherokee-Sioux Falls line represents ICG's sole operation in the State of South Dakota. When it is abandoned and the right-of-way sold, South Dakota will no longer have jurisdiction to levy any form of taxes on ICG, and the specific taxes at issue will clearly not continue to be paid.

Burden of proof.—At each point in their argument, intervenors reiterate that the applicant railroad has the burden of proof throughout an abandonment proceeding. That is a correct proposition, but unreasonable conclusions must not be drawn from it. The applicant has the ultimate burden of convincing the Commission, upon all of the evidence, that abandonment is consistent with the public convenience and necessity, and should be authorized. It also has the burden of producing the detailed evidence called for by the Commission's abandonment regulations, covering every principal element of its case-in-chief for abandonment. Further, it must respond to protestants' requests for discovery of additional relevant and material data in its possession, and must allow them, through cross-examination of competent and

knowledgeable witnesses which it must produce, to test and where possible rebut its case. But the applicant, having gone this far, is entitled to have reasonable inferences drawn from its evidence unless and until rebutted,. It is not held to the impossible standard of proving by affirmative evidence the negative of every proposition the protestants may choose to advance, regardless of how little evidence they adduce in support of that proposition.

This case presents an example of what we are talking about.[8] The Administrative Law Judge held that ICG should be able to regain the large volume of fresh meat traffic shipped in railroad-owned refrigerated truck trailers that it formerly enjoyed out of Sioux Falls, even though no shipper testified at the hearing that it currently needs or desires such service. Division 1 considered the Administrative Law Judge's assumption that this traffic was recoverable was both speculative and unrealistic, in the absence of supporting shipper testimony.[9] Intervenors' argument now is that division 1 erred because ICG has the burden of proof: "It is for the carrier to show that the business cannot be regained." (Petition, p. 8.)

We think this carries the principle of the applicant's burden of proof to a ridiculous extreme. Having shown the steady drop-off in traffic on the Cherokee-Sioux Falls line in recent years, and having fully explained the circumstances under which it canceled its refrigerated meat tariff, ICG was entitled to rely on the inference from this evidence, often stated in our abandonment decisions, that future traffic trends are likely to be a continuation of past ones—an inference we believe is justified unless and until affirmative evidence to the contrary is introduced. Shipper testimony as to future transportation needs and desires is highly probative to that end, though of course not conclusive if disputed; but in the absence of such testimony, it was error for the Administrative Law Judge to indulge in speculation as to future traffic possibilities. It would be

[8] Although intervenors argue the labor cost issue as if it was a question of burden of proof, we do not see it primarily as such. As our earlier discussion makes clear, we would take train crew costs into account in calculating the profitability of the line at issue for abandonment here even if it were conclusively shown that under the local labor agreement ICG would have to go on paying these crews for a time and could not assign them any other duties. Thus the question of who has the burden of showing the provisions and proper interpretation of the labor agreement does not arise, because the agreement is simply irrelevant to the matter at issue.

It is possible the Administrative Law Judge saw the real property tax issue as one of burden of proof, although the initial decision does not so state. If so, we hold the burden she imposed on the applicant to be an unreasonable one, as our discussion above makes clear.

[9] The division 1 decision refers to this as "frozen meat traffic." Actually the meat in question is not frozen but refrigerated.

quite unreasonable to demand that the applicant must produce evidence that shippers and receivers do *not* desire or need a particular service they are not currently receiving, when there is no testimony in the record that they do.

Our abandonment regulations are highly relevant to the issue of burden of proof. The present version of these regulations[10] was adopted both to implement the specific legislative requirements of the 4R Act and to introduce an increased degree of objectivity and uniformity into abandonment proceedings, particularly with regard to the revenues and costs which should be taken into account in appraising whether or not the operations proposed for abandonment have been or will be burdensome to the applicant and to interstate commerce.[11] We hold that when an applicant has complied fully with these regulations, has produced in evidence the detailed data they call for, and has produced competent witnesses to explain and defend its exhibits, it has met its initial burden of going forward with the evidence, particularly as to those financial and accounting matters which the regulations deal with in great detail.

In our decision adopting these regulations, cited above (354 I.C.C. at 132), we said that they were basically procedural in nature—but the burden of going forward with the evidence is in this sense essentially a procedural matter.[12] Thus, the fact that a particular item such as train crew wages or real property taxes is specifically recognized by the regulations as being includible in avoidable costs does not create a conclusive presumption—it does not, that is to say, preclude a showing by protestants that, in the specific circumstances at issue in a particular case, certain specified costs of this nature are in fact not avoidable. (For example, protestants are entitled to show that the wage costs in question are true joint costs shared with another operation not proposed for abandonment; or that the taxes in question will continue to be assessed against operations not to be abandoned.) But we hold it is for protestants to raise these issues and to rebut the inference created by the applicant's compliance with the regulations and presentation of evidence, either by independent evidence or by cross-examination of the applicant's witnesses. An applicant that has complied with the regulations should not be held to have failed in its

[10] See *Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 129 (1976).

[11] Under the 4R Act, these same calculations are also important in pursuing the option of subsidizing continued service in the event abandonment is authorized.

[12] As indicated previously, the ultimate burden of persuasion as to whether abandonment should be permitted never shifts from the applicant.

burden of proof because it does not go further and, for example, produce evidence of firm offers to purchase its real estate.[13]

Future traffic prospects and ultimate conclusions.—Apart from the issue of burden of proof dealt with above, we do not consider that division 1's reversal of the Administrative Law Judge's conclusions as to the future traffic prospects of the Cherokee-Sioux Falls line presents any issue of general transportation importance, and accordingly we will not disturb the division's findings on this issue. The importance of the issue is greatly reduced, of course, by our affirmance of the division's findings on the cost issues, which serve to demonstrate that the line was significantly unprofitable even *before* ICG canceled its refrigerated meat tariff, and thus lost the traffic which the Administrative Law Judge believed it could regain. Similarly, we see no basis for disturbing division 1's ultimate weighing of the factors of public convenience and necessity, which led it to conclude that abandonment should be permitted.

This decision does not significantly affect the quality of the human environment.

It is ordered:

1. We grant the petitions for leave to intervene.

2. We grant the petition for administrative review of the decision of the Commission, Division 1, in this proceeding served August 29, 1979, with respect to the issues of train and engine crew labor costs, real property taxes, and burden of proof, and deny the petition in all other respects.

3. On the issues as to which review is granted, we affirm the aforesaid decision of the Commission, Division 1.

4. This decision and the decision served August 29, 1979, shall become effective 7 days from the date this decision is served.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, and Alexis. Commissioner Stafford concurred in the result.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

[13] As indicated in a earlier footnote, it is not clear that burden of proof was the basis for the Administrative Law Judge's disallowance of real property tax costs here; but if that was the basis, it was error.

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

NO. AB-43 (Sub-No. 47)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABANDONMENT BETWEEN MILEPOST 0.0 AT CHEROKEE, IOWA AND MILEPOST 96.47 AT SIOUX FALLS, SOUTH DAKOTA, IN CHEROKEE, O'BRIEN, SIOUX, AND LYON COUNTIES, IOWA, ROCK COUNTY, MINNESOTA, AND MINNEHAHA COUNTY, SOUTH DAKOTA

Decided: August 24, 1979

On December 27, 1977, the Illinois Central Gulf Railroad Company (ICG) filed an application to abandon its Sioux Falls District line of railroad which extends between milepost 0.0 at Cherokee, IA, and milepost 96.47 at Sioux Falls, SD. The line traverses points in Cherokee, O'Brien, Sioux, and Lyon Counties, IA, Rock County, MN, and Minnehaha County, SD. In an initial decision served February 6, 1979, the Administrative Law Judge denied the application.

An administrative appeal from the initial decision was filed jointly by ICG and the Iowa Department of Transportation (IDOT). Replies to the administrative appeal were filed jointly by four officials of the United Transportation Union (UTU) and separately by the South Dakota Public Service Commission (SDPUC).

In denying the application, the Judge concluded that the revenues generated over the Sioux Falls District had been sufficient to contribute to the profits of ICG in the prior years for which there was data on the record, and that with appropriate policy adjust-

ments revenues would be sufficient to maintain profitable operations. These conclusions were based upon certain adjustments made by the Judge to the avoidable cost figures submitted by ICG and certain assumptions as to the recapture and increase in volume of lost traffic.

Specifically, the Judge disallowed consideration of the labor cost for enginemen and trainmen operating between Cherokee and Sioux Falls and property taxes associated with the subject line. With regard to the labor cost, the Judge noted a UTU interpretation of an existing labor agreement between UTU and ICG known as a "tabulated local agreement". This interpretation of the agreement holds that the railroad is obligated to pay crew costs notwithstanding an authorized abandonment of the line. The Judge concluded that ICG had failed to satisfactorily establish that approval of the proposed abandonment would result in a savings of these labor costs for ICG.

As to the property taxes, because the record failed to reveal any firm offers for the property, the Judge determined that these taxes could not be recognized as an avoidable cost.

Turning to the subject of revenues, the Judge, while acknowledging a significant decline of traffic over the line, found this to be the direct result of ICG's actions in relinquishing its fresh meat traffic. The Judge concluded that this traffic could be recaptured if ICG would secure appropriate equipment to service fresh meat shippers. The Judge further concluded that while grain movements, which had never been substantial over the Sioux Falls District, had been lost to lines capable of handling large unit trains, sufficient traffic could be recaptured, and new traffic regenerated, to maintain a profitable operation if ICG would offer attractive rates to grain shippers in need of small grain cars.

Appellants direct their administrative appeal to those findings of the Judge which lend support to the conclusion that ICG has

reasonable prospects for operating its Sioux Falls District at a profit. They particularly object to the disallowance of train and engine crew wage and fringe benefits and real property taxes as variable costs attributable to the operation of the line. They also object to the conclusion that sufficient fresh meat traffic can be recaptured and grain traffic attracted to enable ICG to maintain profitable operations over the line. With regard to the labor cost disallowance, appellants contend that the Judge improperly relied on testimony given in another proceeding which had been brought to the attention of the Judge in the post hearing brief filed by UTU.

DISCUSSION AND CONCLUSION

The initial decision contains a detailed discussion of the facts which, except as supplemented or modified in this decision, are adopted as our own. From our examination of the facts, however, our findings differ from those of the Judge. We conclude that the proposed abandonment should be authorized.

Turning first to the testimony given in a prior proceeding, we believe that the subject matter of the testimony and the manner and circumstances in which it was introduced into this proceeding was such that it was within the prerogative of the Judge to give it consideration. The subject of the testimony was an interpretation of the meaning and effect of a "tabulated local agreement". It was offered by a witness who appeared on behalf of applicant in this proceeding but was not questioned on this record by either applicant or protestants with regard to this subject. The testimony was appended to the post hearing brief submitted by UTU and lent support to the position advocated by UTU as to the effect of a "tabulated local agreement".

While the subject testimony was not submitted in accordance with Rule 80 of the Commission's General Rules of Practice, no challenge or objection to the post hearing brief or appended tes-

timony was offered by appellants. It is appropriate for the Commission to take Official Notice of testimony given in one of its proceedings. As the appended testimony purported to offer an interpretation of a labor-management agreement which the Judge felt was significant to this proceeding, we believe that it was within her prerogative to reflect upon and give consideration to this testimony.

Notwithstanding our conclusion that consideration can be given to the testimony appended to the UTU post hearing brief, we do not agree that train and engine crew labor costs have been properly excluded as avoidable costs. The Commission in developing its standards for determining avoidable costs for providing service over rail properties carefully recognized common variable costs, *Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 129, 156. Included among the avoidable cost items identified in the Commission's current regulations under the heading "Calculation of avoidable costs" (within the operating expense group "(c) Transportation") are the salaries and wages for engine crews and train crews assigned to previous Account Nos. 392 and 401. 49 CFR 1121.42 (1978). The totals contained in the latter two accounts were excluded from consideration by the Judge.

The exclusion was based upon an interpretation as to the effect of the "tabulated local agreement" upon the proposed abandonment, an interpretation which ICG vigorously disputes. The disputed "tabulated local agreement" is a private labor-management agreement between UTU and ICG. The interpretation of a private labor-management agreement is not within the purview of the Commission's expertise or responsibility. Nor can the existence of such a private agreement operate to effect Commission consideration and determination of questions of public convenience and necessity. *Burke County, Georgia* v. *United States*, 206 F. Supp. 586, 588 (1962); *Baton Rouge Bus Co. Abandonment*, 275 I.C.C. 1, 5 (1949). In the face of existing Commission regulations which clearly accept and recognize train engine crew

labor costs as avoidable costs, the existence of a private "tabulated local agreement", the effect of which is in dispute, cannot provide a basis upon which to challenge the avoidable nature of these expenses.

Because labor crew services rendered in operating a line between Cherokee and Sioux Falls must be attributed to operations between Cherokee and Sioux Falls, such labor crew costs are avoidable costs arising out of the Cherokee-Sioux Falls operation and will be so recognized in our deliberations in this proceeding.

Commission abandonment regulations also recognize real property taxes as avoidable costs, 49 CFR 1121.42(j). A review of the record indicates that it is the intention of ICG to liquidate the properties in its Sioux Falls District if abandonment is authorized in this proceeding. A firm offer for these properties is not required as a condition for treating these expenses as avoidable costs. The real taxes were properly identified by applicant as avoidable costs, and we recognize them as such.

As to the Judge's conclusions regarding ICG's possibilities for recapture and increase of traffic, we believe the Judge's views to be unduly optimistic and not supported by the record. To assume that frozen meat traffic can be recaptured in the face of a complete absence on the record of shipper witnesses expressing a desire for this service is both speculative and unrealistic. Similarly, the probability of a significant increase in grain traffic appears quite remote, even with an adjustment in the ICG rate structure for small grain shipments, when it is recognized that grain movements over the Sioux Falls District have never been substantial. We conclude that ICG can not reasonably anticipate a significant increase in revenues from operations over its Sioux Falls District, particularly revenues arising out of fresh meat and grain traffic.

Traffic over the Sioux Falls District has been steadily declining since 1974 as is indicated in the following chart:

YEAR	# OF CARLOADINGS
1974	7,400 approx.
1975	4,816
1976	3,744
1977	3,429
1978 (6 Mo.)	1,063

ICG's revenue/cost figures summarized on page 6 of the initial decision provide an accurate reflection of the financial results of its recent past operations over the Sioux Falls District and indicate an ominous trend for the future. Calendar year data indicate a $124,229 profit for 1975, a $53,041 loss for 1976, and a $116,740 loss for the first 9 months of 1977. Fiscal year totals indicate a profit of $24,596 for the period ended June 30, 1976, and a loss of $133,122 for the period ended June 30, 1977. Without fresh meat traffic (movements of fresh meat traffic terminated in December 1977) operations for the fiscal year ended June 30, 1977, would have resulted in a loss of $493,672.

Upon evaluating the evidence in light of factors discussed above, we believe that continued operation of the Sioux Falls District will impose an undue economic burden upon ICG, an economic burden which the inconvenience and additional expense to shippers and adverse impact on rural and community development in the area cannot offset. We adopt the environmental threshold assessment survey (TAS) prepared by the Commission's Section of Energy and Environment (SEE). Although we are not in full agreement with the Judge's evaluation of the TAS, we accept the Judge's conclusions as to the adverse environmental factors which will result from approval of the proposed abandonment. Considering these adverse environmental factors in conjunction with the economic burdens which abandonment will impose upon shippers and community development, we must conclude that they are collectively insufficient to offset the economic

advantages to ICG and through ICG to interstate commerce which will result from an authorization of abandonment in this proceeding.

By supplemental addendum to the TAS dated October 17, 1978, the SEE recommended the imposition of certain conditions to avoid or mitigate potential adverse effects upon certain historic properties located on the subject line in the event that abandonment was authorized in this proceeding. The properties were identified as the passenger depot at Sioux Falls, SD, and the Bastian Archeological site near Cherokee, IA. The passenger depot has been identified by the United States Department of Interior (Heritage Conservation and Recreation Service) as a property eligible for inclusion in the *Nationa' Register of Historic Places.* The Bastian Archeological site is presently included in the *National Register.* Pursuant to section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470f, as amended, 90 Stat. 1320) a Memorandum of Agreement was adopted by representatives of the Commission (the SEE), the Advisory Council of Historic Preservation, and the Historic Preservation Officers of the States of Iowa and South Dakota. The Memorandum to Agreement urged the Commission to adopt the conditions proposed by the SEE in the event that the proposed abandonment is authorized. The proposed conditions are directed at promoting the preservation of our historic and cultural resources, objectives which are consistent with the mandates contained in the National Environmental Policy Act and the National Historic Preservation Act. The requested conditions will be imposed.

We find that the present and future public convenience and necessity permits the abandonment by Illinois Central Gulf Railroad Company of its Sioux Falls District line of railroad extending between milepost 0.0 at Cherokee, IA, and milepost 96.47 at Sioux Falls, SD. To protect the interests of employees who may be affected by this authorization to abandon, the conditions set forth in *Oregon Short Line R. Co. Abandonment-Goshen,*

(Oregon III), 360 I.C.C. 91 (1979), will be imposed should applicant effectuate the proposed abandonment. We further find this decision is not a major Federal action significantly affecting the quality of the human environment, nor is it a major regulatory action within the meaning of the Energy Policy and Conservation Act of 1975.

It is ordered:

1. Abandonment by the Illinois Central Gulf Railroad Company of its Sioux Falls District line of railroad extending between milepost 0.0. at Cherokee, IA, and milepost 96.47 at Sioux Falls, SD, is authorized, subject to the conditions for the protection of employees set forth in *Oregon Short Line R. Co.-Abandonment-Goshen*, (Oregon III), 360 I.C.C. 91 (1979).

2. Any certificate of abandonment issued by virtue of the authorization stated in paragraph (1) shall include and be subject to the following conditions:

(a) The Illinois Central Gulf Railroad Company shall notify the Iowa Historical Society at least 30 days prior to undertaking efforts to salvage track located in the vicinity of the Bastian Archeological site to allow the society to secure the services of a trained archeologist to monitor the salvage operations.

(b) The Illinois Central Gulf Railroad Company shall not sell, lease, exchange, or otherwise dispose of the right-of-way underlying the track located in the Bastian Archeological site, including all bridges and culverts, for a period of 120 days following the issuance of the certificate unless this property is first offered, upon reasonable terms, to public authorities or other responsible persons interested in acquiring the property for public use.

(c) The Illinois Central Gulf Railroad Company shall include in any contract for sale of those portions of its right-of-way within which the Bastian Archeological site is located, a provision requiring the purchaser to

notify the Iowa Historical Society of their plans for the property.

(d) The Illinois Central Gulf Railroad Company shall maintain the Sioux Falls passenger depot for a period of time not to exceed 180 days from the date of issuance of the certificate. During this time it shall take reasonable steps to prevent significant alteration or deterioration of the station and afford to any public agency or private organization wishing to acquire the station for public use the right of first refusal for its acquisition.

(e) In the event that the Illinois Central Gulf Railroad Company plans to demolish the Sioux Falls depot or sell it for a use which would adversely affect its historic qualities, it must document the building in accordance with the standards of the Historic American Buildings Survey. The extent and nature of such documentation is to be developed in consultation with the Historic American Buildings Survey. Copies of the documentation are to be provided to the Historic American Buildings Survey and the South Dakota State Historic Preservation Officer for inclusion in their respective archival collections.

(f) The Illinois Central Gulf Railroad Company shall notify the South Dakota Department of Educational and Cultural Affairs, Historical Preservation Center (HPC), of its plans for the Sioux Falls depot. If the Illinois Central Gulf Railroad Company sells the property, it shall include in its contract of sale a provision requiring the purchaser to notify the HPC of its plans for the structure. The purpose of this condition is to provide HPC with notice of any proposed plans. It does not subject any proposed plan to approval by HPC.

3. In the event any person or government entity is considering an offer of financial assistance to enable the subject rail service to be continued, the offeror should comply with 49 CFR 1121.38(b). Within 10 days after receiving appropriate notification that an offer of financial assistance is being considered, applicant shall comply with the information requirements of 49 CFR 1121.38(e).

4. All correspondence to the Commission with respect to offers of financial assistance for the continued operation or acquisition of the subject line shall contain an appropriate reference to this proceeding, and the following notation shall be typed in boldface on the lower left-hand corner of envelopes containing such correspondence: "Section of Finance, AB-RSCP".

5. Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued. Applicant shall not effect any abandonment or discontinuance of service prior to the effective date of the certificate of abandonment.

6. This decision will be effective 30 days from the date it is served.

By the Commission, Division 1, Commissioners Clapp, Stafford, and Trantum.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-43 (Sub-No. 47)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABANDONMENT BETWEEN MILEPOST 0.0 AT CHEROKEE, IOWA AND MILEPOST 96.47 AT SIOUX FALLS, SOUTH DAKOTA, IN CHEROKEE, O'BRIEN, SIOUX AND LYON COUNTIES, IOWA, ROCK COUNTY, MINNESOTA, AND MINNEHAHA COUNTY, SOUTH DAKOTA

Decided: January 12, 1979

By application filed on December 27, 1977 the Illinois Central Gulf Railroad Company (ICG or applicant) seeks an order, under Section la of the Interstate Commerce Act (49 USC 10903(a)), finding that public convenience and necessity permit the abandonment of applicant's Sioux Falls District, from Milepost 0.0 at Cherokee, IA, to Milepost 96.47 at Sioux Falls, SD, and a certificate authorizing the abandonment. The application includes all yard and side tracks. Notice of the abandonment was posted and served as required under the Act and applicable regulations.

A hearing on the application was held on May 8, 9, and 10, in Cherokee, IA. Appearing in protest to the application were the South Dakota Public Utilities Commission (SDPUC), officials of the United Transportation Union (UTU), various public witnesses from Iowa and South Dakota, and the Transportation Regulation Board of the Iowa Department of Transportation (IDOT). At the commencement of the hearing, the Acting Chief

Counsel for IDOT announced that IDOT had decided to support the ICG application, except for a two-mile segment between Milepost 0.0 and 2.0. On May 9, IDOT announced that an agreement had been finalized between the ICG, the Cherokee Industrial Corporation, and Hy-Vee stores, whereby ICG will lease the first two miles of the Sioux Falls District, following its abandonment, to Cherokee Industrial Corporation for use as an industrial spur for service, as may be needed, to an industrial park area. As a result of the agreement, IDOT withdrew its objections relative to the abandonment, and actively supported the proposal at the hearing.

The Commission's Section of Energy and Environment filed a threshold assessment survey (TAS) on August 3, 1978, and two addendums thereto, one on October 5 responding to public comments on the TAS, and one on October 17, concerning historic sites and buildings. On October 26, a hearing was held on the environmental issues.

Briefs have been filed following both the May and October hearings. All contentions made in the briefs have been considered in reaching this decision.

FINDINGS

I. Condition of the ICG

ICG is the predecessor of the Illinois Central, a land-grant railroad with main lines between Chicago and the Gulf of Mexico, and a wholly-owned subsidiary of IC Industries. ICG was founded 127 years ago; purchased the Sioux Falls District in 1888 from another railroad; and is the predecessor company of IC Industries, which was founded in 1962 to acquire and control non-rail business. Substantial diversification began in 1968; and activities now include five discrete groups—commercial products, consumer products, real estate, financial, and transportation. In 1977, IC Industries enjoyed record sales and earnings, with a net income of nearly 79 million dollars. It had a favorable debt-to-

capitalization ratio in 1977 of 37.9 percent compared to 37.7 in 1976. As of December 31, 1977, it had credit lines of 269.5 million dollars. In 1977, 36 percent of the revenues of IC Industries came from the transportation group of companies, but only 4 percent of its pretax income. The commercial and consumer groups contributed 77 percent of IC Industries' 1977 pretax income and include such products as Pepsi-Cola, Bubble Up, Dad's Root Beer, and Midas Mufflers. Such products are becoming the foundation for the long-range structure of IC Industries. IC Industries has informed its stockholders that while it intends to operate ICG on a profitable basis, in all likelihood ICG will be merged or sold at some future date.

In its 1977 Annual Report to stockholders, IC Industries heralded as a "major accomplishment in 1977" the "strong turnabout and return to profitability of the IC Transportation Group." See page 3 of Exhibit 10. ICG is the group's primary operating company. The only other company in the group is Chicago & Illinois Western Railroad. Under the accounting basis used by I.C.C., ICG had a net income of $3,339,000 in 1977. Pretax transportation income of ICG, in 1977, was $4,741,000. In addition, ICG enjoyed considerable income from real estate sales in 1977. In 1977 ICG, under provisions of the Railroad Revitalization and Regulatory Act of 1976, issued $12,360,000 of non-voting redeemable preference shares to the United States of America. Funds from these shares are to be used for certain track rehabilitation projects. An additional 12 million dollars worth of shares is already committed under this Act.

As of December 31, 1977, ICG had current assets of $159,134,000 and current liabilities of $151,499,000. On the asset side, it had capital and other special funds of $12,506,000; $49,169,000 in investments; $1,109,623,000 in properties; and other assets and deferred charges of $24,104,000. On the liability side, it had long-term debt due in one year of $33,322,000; long-term debt due after one year of $386,539,000; casualty and other

reserves of $12,296,000; other liabilities and deferred credits of $78,321,000; shareholder's equity of $692,559,000; and retained income of $414,420,000. See pages 1 and 2 of Appendix D to Exhibit 7.

ICG's net income from transportation reached a high point of $32,710,000 in 1973 (the year IC Industries purchased Bubble Up). It has declined sharply since that time. Were it not for real estate sales, ICG would have suffered a loss in 1975 of $16,191,000, in 1976 of $21,447,000, and in 1977 of $23,914,000. No dividends have been paid since December 31, 1975.

ICG shows a working-capital deficit of 25.7 million dollars in 1977, a deficit of 31.1 in 1976, and a deficit of 43.3 in 1975. As of December 31, 1977, IC Industries had advanced ICG a net of $7,617,398. See page 5 of Exhibit 7.

ICG has an abandonment program underway to abandon what it regards as "uneconomic trackage." See page 23 of Exhibit 10. It has received final or conditional authority to abandon 854 miles; and 946 additional miles are the subject of already-pending, abandonment applications to this Commission.

II. Traffic Over the Sioux Falls District

The Sioux Falls District has historically been used to transport light loading traffic, mainly merchandise shipped in trailers on flatcars (TOFC or piggyback traffic) and fresh meat. In the first six months of 1978, however, no fresh meat has moved over the line. This is because ICG chose to cancel its tariff on fresh meat moved in ICG refrigerated trailers. The cancellation became effective on December 10, 1977. Prior to this tariff cancellation, Iowa Beef Packers shipped a substantial amount of meat over the Sioux Falls District (from Luverne, MN, via highway to Sioux Falls) in refrigerated trailers furnished by ICG. The meat was destined to markets on the East Coast. The meat trailers wore out. Damage claims were very high. Iowa Beef Packers suffered a

strike in 1977 and was not shipping as much as before. Accordingly, ICG elected not to replace the old trailers with new ones; and it cancelled its meat tariff. As a result, ICG carries no meat today in its own refrigerated trailers, from Sioux Falls. In 1977 ICG carried 30,000 tons of meat traffic. A small amount of fresh meat and some canned meat still originates at Sioux Falls and moves over the line in refrigerated cars owned by Morrell Packing Company, which has a Sioux Falls plant.

The Sioux Falls District has never originated any substantial movements of grain. Generally, grain shippers prefer to use 100-ton cars, in unit trains, which are more economic but too heavy for the Sioux Falls District. Corn, grain, and soybeans accounted for 832 loads in 1974, 183 in 1975 (a drought year), 28 in 1976 (another drought year), 37 in 1977, and 51 in the first six months of 1978.

The following chart illustrates the decline in traffic over the Sioux Falls District:

	Total loadings	S. Dakota loadings*
1974	approx. 7400 cars	6188 cars
1975	4816 cars	4212 cars
1976	3744 cars	3339 cars
1977	3429 cars	3020 cars
1978 (6 mo.)	1063 cars	894 cars

*Sioux Falls and Rowena carloads, mostly Sioux Falls. The relinquishment by ICG of its fresh-meat business (by the cancellation of its fresh-meat tariff) contributed greatly to this decline.

III. Condition of the Line Proposed for Abandonment

ICG operates freight trains six days a week, in both directions, over its Sioux Falls District. One crew of four, sometimes five men handles the round trip. The fifth man is a fireman. Westbound trains (i.e., from Cherokee to Sioux Falls) are scheduled to depart Cherokee shortly before midnight, Sunday through Friday, and generally arrive in Sioux Falls 3 hours and 30 minutes after actual departure. During daylight hours, switching service is per-

formed at Sioux Falls. The returning eastbound trains operate Monday through Saturday. They are scheduled to depart Sioux Falls around 4:30 P.M. and to arrive at Cherokee at 8:00 P.M. At Cherokee, eastbound freight is transferred to continuing eastbound trains moving ultimately to Chicago. The through trains to Chicago originates at Council Bluffs, IA.

Maximum authorized train speeds are 40 miles an hour between Milepost 0 and 37 and between Milepost 68 and Sioux Falls, and 30 miles an hour between Mileposts 37 and 68. In addition, three long steel bridges require a maximum train speed of 10 miles per hour at the following locations: at Milepost 21.1, just north of Cherokee; at Milepost 62.7, south of Rock Rapids, IA; and at Milepost 89.1, south and east of Sioux Falls, SD. The reduced speed of 30 miles per hour between Mileposts 37 and 68 is because of a lighter weight of rail in that area. The reduced speed of 10 miles per hour over the bridges permits a greater weight to pass over them than would higher speeds.

The current weight limit on the line is a gross weight of 177,000 pounds per car. It was imposed in March, 1976. The timetable shows the earlier, gross-weight limit of 210,000 pounds. A gross weight of 210,000 pounds implies a net-lading weight of 150,000 pounds per car or 75 tons, since most empty cars weigh 30 tons. These weight limits are in contrast to other lines of railroad so constructed as to handle cars with 100 tons lading weight. Prior to March, 1976, heavier cars were handled on the line only with empty or "idler" cars on each end of the heavy cars.

The current maximum train speeds of 30 and 40 miles per hour are considered by ICG to be essential for efficient operation of the line. These speeds permit the movement of a train from Cherokee to Sioux Falls, switching work at Sioux Falls, and the return of the train to Cherokee within 24 hours. The present trip between Cherokee and Sioux Falls is currently made in about 3½ hours. A reduction in the maximum speed to 25 miles per hour would

probably result in a one-way trip of 4 hours and 15 minutes. Such a reduction would "perhaps" result in additional time on duty for the employee; and this could "possibly" result in overtime payments to the crews to Sioux Falls. See page 22 of the transcript. A reduction in the maximum speed to 10 miles per hour would probably require a running time of 8½ to 9 hours, exclusive of time for stops and meals; and any amount of switching to be done in Sioux Falls would leave ICG hard pressed to accomplish that and finish within the 12-hour work period prescribed under Federal law. An additional switch engine, or an additional crew might be needed to perform the work; and ICG would quite possibly consider a tri-weekly service, rather than the 6-day schedule now being performed.

IV. Rehabilitation of the Line

Following the hearing in Cherokee in May, 1978, the United States Court of Appeals for the Seventh Circuit upheld the Commission's regulations found in 49 CFR 1121.42(b) dealing with track rehabilitation. See *Chicago and North Western Transportation Co., et al.* v. *United States*, Docket Nos. 76-2283, 77-1008, and 77-1487, modification on petition for rehearing dated July 31, 1978. Under the regulation, costs of track rehabilitation to a standard of FRA Class I safety standard (10 miles per hour) are permitted to be included if the track is below that standard, or rehabilitation costs to a higher standard are permitted if a potential subsidizer requests a level of service requiring a higher standard. No such request is of record in this proceeding. Since the track of the Sioux Falls District is at a FRA Class III level (40 miles an hour), no track rehabilitation costs should be considered for the present service, as ICG concedes at page 11 of its supplemental brief.

Rehabilitation of bridges is another matter, as bridges are not related to track safety standards. ICG presented evidence, through testimony of a drainage engineer in its bridge depart-

ment, that two bridges needed replacement, due to age and condition, at an estimated cost of $121,540. The estimate was based on system-wide average costs of $515 per foot. This engineer had travelled the Sioux Falls District and examined these bridges, which are at Mileposts 14.3 and 15.6. These bridges were built in 1922 and 1923. He testified that both should be scheduled for renewal in 1979. There are no speed restrictions on these bridges and they can be and are traversed at 40 miles an hour—a point argued by UTU as indicating that renewal is not necessary. ICG's engineer explained that the bridges at Mileposts 14.3 and 15.6, are timber bridges which "bounce back" from sudden overstresses (Tr. 133), unlike steel bridges, upon which speed restrictions to 10 miles per hour are imposed. Therefore, the lack of speed restrictions on the bridges at Mileposts 14.3 and 15.6 is not significant. There is substantial evidence supporting the need for both bridge replacements. Although the cost is only estimated, it was agreed to by the bridge engineering department of IDOT. Accordingly, it is accepted as being reasonably accurate.

V. Revenues and Avoidable Costs Upon Abandonment

Exhibits 2, 7, 8 and 9 provide revenues and variable-cost data for the line. Appendix A to Exhibit 7 reflects much of the same information as contained in corresponding Exhibits 4(1), 5, 6, 7, 8, 17 and 18 attached to the application, with certain corrections. The application exhibits contain data as recent as June 30, 1977, while Exhibit 7 contains data as recent as September 30, 1977.

The cost format used by ICG follows the format prescribed by the Commission in Ex Parte 274 (Sub-No. 2), *Abandonment of Railroad Lines and Discontinuance of Service*, 354 I.C.C. 252, 279 (1976). See 49 CFR 1121.40-46 (1977). By this procedure, the Commission considers the actual on-branch costs, and the Carrier's Rail Form A off-branch costs, to determine the total costs of handling traffic moving to and from points on a given branch, or moving via junctions on the branch. The Commission

has discarded the "50 percent" formula, i.e., that 50 percent of an allocation of off-branch revenue would be a reasonable estimate of the cost of handling such business off of the branch. This portion of the Commission's regulations, in Ex Parte 274 (Sub-No. 2), was recently affirmed by the United States Court of Appeals for the Seventh Circuit, in *Chicago and North Western Transportation Company, et al.* v. *United States, et al.*, Nos. 76-2283, 77-1008, and 77-1487 (May 30, 1978).

Revenues, variable costs, and losses (contributions) from operations were shown by ICG to be as follows:

	1975	1976	1977-9 months
Revenues	$2,153,584	$1,734,875	$1,298,584
Costs.....	2,029,355	1,787,916	1,415,324
Loss	(124,229)	53,041	116,740

Fiscal year data was as follows:

	FY-76	FY-77 (actual)	FY-77 (without fresh-meat traffic)
Revenues	$1,864,055	$1,721,304	$ 743,518
Expenses.....	1,839,459	1,854,426	1,237,190*
Loss	(24,596)	133,122	493,672

*No allowance is made for expenses on fresh-meat traffic, such as its high-claim rate.

For an earlier period (July 1, 1974 to June 30, 1975) ICG showed a profit from the line of $327,421 (page 6 of Appendix A to Exhibit 7)—a figure which is understated because it includes wages of trainmen and enginemen as avoidable costs.

According to UTU, the wages of train enginemen and trainmen are not avoidable upon abandonment because of a local agreement which requires the railroad to assign two crews regularly to operate not less than six days a week between Cherokee and Sioux Falls and, if the line is not operated, to pay them the mileage of their assignment. See transcript pages 461-462. According to UTU, ICG cannot require these Sioux Falls District crews to

relocate and, if they voluntarily do so, ICG will still have to assign two crews to the Sioux Falls District and pay them. ICG here refutes this interpretation to the agreement (transcript pages 472-473); but it seems to have acknowledged it, in other proceedings.[1] Also, seniority rules protect the jobs of the enginemen and firemen, who would be shifted to other lines, to fill vacant firemen slots on other lines. ICG did not establish by reliable, probative, and substantial evidence that the wages of these employees would be saved. Therefore, costs assigned to their labor must be deducted, along with the wage additions for fringe benefits and payroll taxes.[2] This reduction results in a showing that the Sioux Falls District has made a contribution to the ICG over recent years. See Exhibit 2 and Appendix A to Exhibit 7. Exhibit 2 shows the following pertinent figures for Account Nos. 392 (Train Enginemen), and 401 (Trainmen), and for Health & Welfare (H&W) and Payroll Taxes (PT) additives:

	1975	1976	1977 (9 months)
Train Enginemen.....	$ 46,678	$ 57,222	$ 45,757
Trainmen	108,914	133,517	106,764
H&W.....	5.75%	6.5%	6.5%
PT	17.16%	17.70%	17.70%

[1]UTU attaches to its brief portions of testimony by an ICG witness, in Docket No. AB-43 (Sub-No. 37), that acknowledges this effect as to a "tab local" agreement, which is the type involved in this proceeding. See page 462 of the transcript.

[2]UTU would also deduct the labor portion of accounts 311 (locomotive repair), 394 (train fuel), 400 (servicing locomotives), and 402 (train supplies and expenses). Under Ex Parte No. 274 (Sub-No. 2) the expenses in these accounts are properly treated by ICG. See 49 CFR § 1142 (1977).

Using these figures to recompute the contribution/loss status of the Sioux Falls District to the ICG, the following contributions are shown:

	1975	1976	1977 (9 months)
Revenues	$2,153,584	$1,734,875	$1,298,584
Costs, as per ICG ..	2,029,355	1,787,916	1,415,324
Wages to be deducted	155,592	190,739	152,521
Plus H&W deductions	8,946	12,398	9,913
Plus PT deductions	26,699	33,760	26,996
Total deductions ...	191,237	236,897	189,430
Recomputed costs ..	1,838,118	1,551,019	1,225,894
Contribution	315,466	183,856	72,690

Another avoidable cost claimed by ICG is for property taxes. Such avoidance depends upon sale of the property for which no firm offers are on hand. If these figures are deducted, the contributions made by the Sioux Falls District are even more significant, as follows:

	1975	1976	1977 (9 months)
Property taxes	$ 71,725	$ 60,678	$ 45,509
Recomputed contribution	387,191	244,534	118,199

ICG claims an increase in avoidable costs will occur as to maintenance-of-way expenses, in order to continue operating at Class III speeds (up to $3,930 per mile compared to $130,005 for the 12 months ending June 30, 1977). This estimate is based on system-average costs and seems excessive since trains currently can operate over the track at speeds of up to 40 miles an hour, and the track seems to have been maintained in fair shape for the considerably lower figure. No estimate was adduced for operating the trains at the slower speed of a Class I railline. Such costs might be lower than those expended to maintain Class III speeds.

VI. Investment Values for Computing Rate of Return

The investment base to which any rate of return should apply is considered by the Commission to be working capital (operating expenses divided by 365 days, multiplied by 15 days on branch cash avoidable costs less depreciation), plus any income tax benefits resulting from abandonment of the line, plus net liquidation value of property for their highest and best use for non-rail purposes. See 49 CFR 1121.43 (1977). The most recent year for which data is available in the record (July 1, 1976 through June 30, 1977) shows a working capital need of $88,516. See page 8 of Appendix A to Exhibit 7. However, ICG mistakenly included off branch costs in these calculations (Tr. 316). Properly computed, the working capital need is $42,088. No income tax benefits are seen by ICG by virtue of this abandonment.

The estimated value of the land in the line, apart from any salvage of materials, is about $3,635,000. The right of way between the towns contains 1,060 acres; and the estimated value is $1,590,000, apart from an assemblage factor. As a continuous strip of land, the property has value for a utility, or a pipeline, or a highway, or for recreational purposes; but ICG knows of no present potential purchaser of the line who would want the entire line. There is farming in the area adjacent to the line; and ICG believes that the land will ultimately be sold for farming purposes. Some inquiries have been received from individuals and attorneys representing adjacent landowners. With an assemblage factor of 50 percent the value is $2,385,000, based on 17 previous agricultural land sales in the area. The land in the towns contains 154 acres, valued at $1,250,000, based on 38 comparable sales. The title to 90 to 95 percent of the land is regarded by ICG as "reasonably merchantable." See page 224 of the transcript. While ICG is a land-grant railroad, the land in question was acquired from adjoining property owners. Title to 90 to 95 percent of the land is held in fee; and there are no reverters in the balance held. A total land value of $3,635,000 represents the highest and best use of the land for non-rail purposes.

Salvage of track materials was estimated on the basis of the January, 1978, Chicago scrap market. All metal items, except rail of 90 pounds or higher, were estimated at scrap prices, even though the possibility exists that some materials could be reused. This results in the lowest possible net salvage value of $2,522,829. Reusable rail was valued at three quarters of the value of new rail, since it could be reused elsewhere on the ICG system as second-hand rail. No salvage value was assigned to bridges because the value of scrap is usually offset by the cost of removal of bridges, and because prospective land purchasers may desire that the bridges be left in place. A salvage value of $2,522,829 is accepted. The total liquidation value is, therefore, $6,157,829.

VII. State Participation in the Proceeding

The Sioux Falls District traverses three States: Iowa, Minnesota, and South Dakota. The major shipping point on the line is Sioux Falls, a city with a 1970 population of 79,000. The 1970 population of other South Dakota cities on the line totaled somewhat over 100 (Benclare and Rowena). The 1970 population of the 10 Iowa cities to lose service over the line (excluding Cherokee) totaled 10,046. The 2 Minnesota cities on the line (Steen and Hills) together had a 1970 population of 762.

IDOT's Trans Plan 1977 included the Sioux Falls District in the Iowa minimum rail system and identified it as crucial to Iowa's economic and social well-being. A new plan has won preliminary approval, however. At a meeting held six days before this hearing, IDOT decided to support the abandonment, except for the two-mile portion out of Cherokee. This decision, and IDOT's vigorous participation at the hearing in support of abandonment seems to have greatly surprised SDPUC, UTU, and at least one Iowa public witness, Roger Immele. IDOT demonstrated that, pursuant to its rail assistance program, it held three public meetings to solicit shipper response from the 43 shippers on the portion of the line in Iowa. There were no more than ten shippers

at any of the meetings and as few as three at the one held on April 27, 1978. Out of approximately 15 Iowa grain and fertilizer shippers on the line, 12 responded to IDOT shipper surveys sent out in December 1977. The surveys were limited to Iowa shippers and apparently revealed that approximately 311 cars would be shipped in calendar year 1978, compared to about 603 moved in 1975 and 403, in 1976. The shipper surveys were not adduced.

IDOT also established that in May 1976 Iowa shippers over the Sioux Falls District withdrew their offer to participate in Iowa's branchline assistance program, whereby branchlines are rehabilitated and maintained with financial assistance from the State and shippers. The State and shippers are repaid, depending upon use of the line. In essence, Iowa's program is a way of lending the railroads money at a low or nonexistent rate of interest. At least part of the reason the shippers withdrew their support is believed by IDOT to be the fact that the 4-R Act was enacted at about this time and, under it, the Federal Government will assist branchlines.

ICG is a participant in Iowa's program, over other of its lines, as are other railroads, with unit-train loading facilities for grain located nearby the Sioux Falls District. It is IDOT's position that, except for certain unspecified portions of the year, on the domestic market, the grain shippers on the Sioux Falls District can more economically move their grain by truck to at least 13 of these unit-train loading facilities, located an average distance of 20 miles from any point on the Sioux Falls District. (The Sioux Falls District does not have a heavy enough capacity to support unit trains.) Since Iowa has millions of dollars invested in the railroads with these unit-train loading facilities, UTU believes that IDOT's decision to support this abandonment application is an attempt to protect its investment in these other, competing lines. There is some merit to this view.

The problem in using unit-train facilities, for small grain shippers along the Sioux Falls District, is that the facilities are owned

by their competitors, who are large grain shippers such as Cargill. Small grain dealers are disadvantaged by having to depend upon and pay for the use of competitors' facilities. UTU views IDOT's position as supportive of agribusinesses over small grain shippers. There is also merit to this view.

IDOT also notes that the Iowa segment of the Sioux Falls District comprises 73 percent of the entire line; that Minnesota was completely silent throughout the proceeding; that, at the May hearing, no official from South Dakota testified; that only three public witnesses from South Dakota testified, two of which (Metz Baking Co. and Hubbard Milling Co.) gave duplicative evidence concerning a two-mile segment in Sioux Falls, SD, and the other depends only on rail to ship oats; and that one witness testified that not only was the amount of Iowa traffic insufficient to justify retention of the line but, furthermore, the South Dakota traffic was also insufficient to cause the line to be viable. (This witness was an employee of IDOT who had little experience in railroading.)

IDOT argues that "financial losses to the ICG resulting from retention and necessary rehabilitation of the subject line would be staggering and not warranted in light of the present and future traffic." See page 2 of IDOT's brief. This statement was made on the basis of ICG's rehabilitation costs being $3,853,331. IDOT's views based on the $121,540 rehabilitation cost now conceded by ICG to be applicable, are not known.

The State of South Dakota, complaining that it "is tired of being on the wrong end of the popsicle stick," continues to vigorously oppose the abandonment of this line. See page 17 of its brief. South Dakota generates over 80 percent of the carloads handled over the Sioux Falls District. However, its State rail plan assigns this line a low-priority status in comparison to the Chicago Northwestern line (CNW) line (which serves Sioux Falls going east to Luverne and hence to Chicago) which is rated

as a high-priority line. The difference may be attributable to the fact that the Sioux Falls District line is the only ICG line in South Dakota, whereas the CNW is one of South Dakota's principal grain carriers.

VIII. Alternate Transportation Services in the Area Served by the Sioux Falls District

The area served by the Sioux Falls District has alternate railroad and highway service available. Four points on the line will continue to have rail trackage:

Cherokee, IA	- ICG
Sheldon, IA	- CNW
	- Chicago, Milw. St. P. & P. (Milwaukee Road)
Hills, MN	- Burlington Northern (BN)
Sioux Falls, SD	- CNW
	- Milwaukee Road
	- BN

Proximity of the rest of the points on the line to nearby stations of other railroads are as follows, based on highway distances to the nearest rail stations:

Larabee, IA	8 miles (ICG)
Calumet, IA	9 miles (CNW)
Gaza, IA	13 miles (CNW)
Primghar, IA	8 miles (Milwaukee Road)
Archer, IA	10 miles (" ")
Sheldon, IA	0 miles (CNW, Milwaukee Road)
Matlock, IA	7 miles (Milwaukee Road)
George, IA	11 miles (Milwaukee Road)
Edna, IA	18 miles (BN)
Rock Rapids, IA	7 miles (")
Steen, MN	8 miles (")
Hills, MN	0 miles (")
Ben Clare, SD	12 miles from Sioux Falls
Rowena, SD	8 miles from " "
Sioux Falls, SD	0 miles (CNW, BN, Milwaukee Road)

As to South Dakota points served by other railroads, the following facts are relevant. The routes of the BN, CNW, and Milwaukee Road between Sioux Falls and Chicago are more circuitous than those of the ICG. ICG provides overnight service between these points, whereas the CNW takes three to four days; BN takes three days; and Milwaukee Road takes four to seven days. The Milwaukee Road is in bankruptcy and may be liquidated. The financial condition of CNW is marginal. The ability of the Milwaukee Road, CNW and BN to provide facilities for handling piggyback cars at Sioux Falls is not clear. The facilities used may belong to ICG; or they may be located elsewhere and reached by truck. Since most of the cars handled on the Sioux Falls District are piggyback ones, the availability of ramping facilities is important. Even ICG's commerce manager has heard that service by other railroads to Chicago from Sioux Falls is "non-existent" although he, himself, is "not sure." Tr. 216.

Nearby lines—ICG main line through Cherokee, the Milwaukee Road line through Sheldon, the CNW, and the Rock Island Line—are capable of loading and moving large grain trains. The Commission's order in ICC Docket No. 35951 required ICG to join the CNW and Milwaukee Road in the publication of joint rates on multi-car shipments of corn and soybeans (minimum weight 183,000 pounds per car) from origins in Iowa, Minnesota, Missouri, Nebraska and South Dakota to Destrehan and Reserve, LA. In compliance with the order, the carriers published the rates to Destrehan, Reserve, and all other ICG-served ports. Single-car joint rates from the same origins were also published from the same origins to the ICG-served ports. In 1977, some 474 carloads of corn and soybeans moved from Hartley, Paullina, Sioux Rapids, and Spencer, IA (all points in close proximity to the ICG Sioux Falls District) to the Gulf ports, via ICG and the other railroads on the joint tariff rates. Additionally there are unit grain train loading points on the ICG main line very near Cherokee, at Alta and Aurelia.

The rail system diagram maps submitted by the various railroads, reveal that there are other lines in the vicinity of the subject line which are potentially subject to abandonment. Section 802 of the 4-R Act required rail carriers subject to the Act to submit to the Commission a full and complete diagram of the carrier's transportation system. The carrier was required to indicate on the diagram lines which are "potentially subject to abandonment". These lines have been subdivided into four categories: Category 1 includes those lines for which an abandonment application is anticipated within 3 years; Category 2 includes those lines under study for future abandonment; Category 3 encompasses those lines for which an abandonment application is presently pending; and Category 4 includes those lines which have been previously authorized for abandonment and are now being operated under subsidy. As related to this proceeding, the CNW line from Alton to Marathon is in Category 1; and a portion of the Rock Island line southeast of Hartley, to Royal, is in Category 3. In addition to the ICG line into Sioux Falls, the CNW and the Milwaukee Road have lines into Sioux Falls which are Category 2; and BN has a Category 1 line through the city. However, Sioux Falls will continue to have 3 lines into the city which are Category 5 lines (not subject to abandonment), all of which go East to Chicago, as above discussed.

While there is trucking of agriculture-related commodities in the area, these are not the primary commodities moved over ICG's Sioux Falls District. ICG's manager of commerce characterized the present traffic forwarded and received on the Sioux Falls District as "scrap iron", "fertilizer chemicals," "merchandise," and "a little bit of lumber." See page 149 of the transcript. He had no information on the amount of motor-carrier equipment, or the authorities of motor carriers to transport these commodities to and from the points along the Sioux Falls District. According to Exhibit 13 and page 2 of Exhibit 10 to the application, U.S. Highways are available from Cherokee to Primghar and

serve Sheldon, Rock Rapids, and Larrabee. The Rand McNally Road Atlas indicates U.S. Highways also serve the Sioux Falls area. State and county paved roads serve the other points on the line.

IX. Shippers and Receivers Served on the South Dakota Portion of the Line

A preponderance of traffic handled in the Sioux Falls District comes on or off the line at Sioux Falls. Out of 24 principal shippers on the line, 8 are in Sioux Falls; and there are at least 18 other shippers at Sioux Falls which are served by this ICG line. See pages 517-519 of the transcript. However, the only Sioux Falls shipper or receiver of freight appearing at the hearing was Metz Baking Company (Metz); and its interest involves a switching service performed by ICG. The failure of more witnesses from Sioux City to appear may be because SDPUC did not receive actual notice of the date and place for the hearing until the Friday preceding the Monday hearing date and because the place of hearing was some 100 miles away.

Metz is the largest commercial bakery in South Dakota, with yearly sales of over 12 million dollars in 1977. Metz receives bulk flour from Hubbard Milling Company, of Rapid City, SD, via Milwaukee Road with delivery within Sioux Falls by ICG over two miles of ICG track which runs right by the Metz plant. The Metz plant is located south of Sioux Falls at Milepost 94.2 between Sioux Falls and Cherokee. ICG has a spur track connecting to the ICG main line between Sioux Falls and Cherokee. For the last 12 months of the fiscal year ending April 30, 1978, Metz received 145,333 hundred weight of flour. By rail it moves at 40 cents a hundred weight; by truck, from Rapid City to Sioux Falls it would cost $1.12 per hundred weight. See page 343 of the transcript. Cost by truck to move 145,333 hundred weight would have been $162,772; cost by rail was $58,133—a difference of $104,639. Increase to the consumer, had truck been used rather

than rail, would have been about $153,368 in 1977, based on 1977 sales and the production costs of a 1-pound loaf of bread. Shipping the flour from Hubbard's plant in Mankato, MN would be even more costly. It is not economically feasible to move the flour by truck from railcars at Sioux Falls to Metz's plant. In checking with the trucking companies, none were interested in such short hauls. Metz does not want to get into the business of hauling raw materials; the railcars hold approximately two and a half times what a tank truck would hold; and the Metz plant would have to be converted to receive flour by truck. If abandonment is inevitable, Metz pleads that the two miles of ICG track from the Milwaukee Road yard be turned over to the Milwaukee Road. Hubbard Milling supports Metz's plea because of threatened competition from Nebraska flour mills. The Metz account constitutes 15 percent of Hubbard's Rapid City production; and Hubbard expects to lose the account if this line ceases operation. At present, no trucking company has authority to haul flour from Rapid City to Sioux Falls.

Jones Mill & Elevator, at Rowena, SD, also appeared in protest. It has consistently and economically used small hopper cars, which the Sioux Falls District can handle with present weight limits. As a small elevator, Jones does not make it a practice to ship by truck to unit-train loading facilities. Jones shipped between 25 and 30 cars of grain in 1977, all south through Cherokee over the ICG. It regards abandonment of this line as "somewhat disastrous" to it, because delivery by truck nets it a "lot less" for grain—29 cents less per bushel for soybean; 23 cents less for corn; and 7½ cents less for oats, as of the market on May 9. See pages 352-353 and 363 of the transcript. Because of droughts in the past two or three years, it has shipped considerably less than in 1973 and 1974. About 40 percent of all grains are shipped out of the area with the rest consumed locally. This year it has experienced a big turnover of grain. Its elevator has a capacity of 85,000 bushels. The turnover could be five to ten times higher this

year than it was for the last two or three years. In 1977 and 1976 it shipped about 25 to 30 cars on the ICG. It challenged ICG's figures, on pages 28 and 29 of Exhibit 8 which showed only 15 boxcars shipped from Rowena in 1976. ICG's own exhibits are conflicting on Rowena traffic. Page 3 of Exhibit 9 to the application shows 17 Rowena "loads" in 1976 and 22 in 1975. Page 3 of Exhibit 12 to the application shows 25 Rowena "loads" in 1975. The discrepancy is due to the different sources used for the exhibits, Exhibit 12 being more accurate. As of May 9, Jones had loaded 20 cars which is all the cars it has been able to get; it has had backorders for 2 more cars for about 3 weeks; and it needs an additional 6 because of an order received that day. Jones only ships by truck when forced to do so by lack of rail service.

Two other receivers of freight have facilities in or adjacent to ICG's yard at Sioux Falls. They are Zip Feed and Cenex. Also, ICG serves the Morrell plant at Sioux Falls, jointly with other railroads. Other large companies use ICG at Sioux Falls. United Parcel trailers, on flatcars, are carried by ICG to Sioux Falls from Chicago, in piggyback service, for deramping at the Sioux Falls facility. The empty trailers are carried by ICG back to Chicago. ICG also serves Montgomery Ward and South Dakota Distributing Company, in piggyback service, to Sioux Falls. These companies are not protestants in this proceeding.

ICG stands willing to sell any or all of its tracks and property in Sioux Falls for continued rail operation to whoever desires to purchase them "at fair value (i.e. fair value of land plus net salvage value of track, if any)."

See page 22 of ICG's brief. Indeed, ICG will be required to offer its tracks and property for sale by reason of Section 1a(6) of the Interstate Commerce Act,[3] following an authorized abandonment. Also, ICG is willing "to enter into a lease of short duration,

[3] 49 U.S.C. 10905.

following abandonment, to permit continued railroad operation over its tracks pending the completion of a sale of the property." Page 22 of ICG's brief.

X. Iowa Public Witnesses Opposing Abandonment

Roger Immele, Cherokee, IA, testified as a life-long citizen of the area of northwest Iowa. He regards the ICG as this area's "last line and the best line," with the closest link to the East, to Chicago, and to the Gulf. See pages 243-244 of the transcript. It is his understanding that the other railroads serving the area, such as the CNW, the Rock Island, the Milwaukee Road are either in bankruptcy or have filed applications for abandonment of lines in the area and that there is no other line running to the Southeast, East, or South. He was so sure that IDOT was going to protest this application that he threw away the questionaire IDOT sent to him last Fall.

The City Administrator of Cherokee, testifying on behalf of the City Council, stated the basis for the city's opposition to the proposed abandonment. Noted was the absence of a freeway system, a port, and a navigable river to serve the area. Stressed was the increased importance of energy conservation, making vital the retention of transportation services that will move the largest volume of goods, at the least possible cost and expenditure of fuel. Labeled "unwise" was the giving up of a resource such as a railline at this point in the history of our country. See page 250 of the transcript. A warning was expressed that duplication of this service at a future date would be economically very unlikely. Note was made that a viable rail transportation system is an important ingredient in the employment potential of an area.

The Iowa portion of the Sioux Falls District traverses farmland; and a number of Iowa public witnesses testified to a continuing need to receive fertilizer over it. Trucking can add an average of $7 to the per-ton cost of shipping fertilizer, including the shrink-

age factor whenever fertilizer is unloaded. This cost might be compensated for by trucking from railpoints which can handle 100-ton railcars and enjoy lower rates. But at least one shipper, Land O'Lakes, has found there to be a "serious shortage" of trucks in the area to haul fertilizer. Transcript page 443. The possibility of a large unloading facility being built at Cherokee, whereby fertilizer could be offloaded onto trucks from 100-ton railcars, is just a rumor.

One Iowa fertilizer dealer who testified was Farmer's Co-op, located on the line at Larrabee and having 268 members. At a cost of $110,000, the Co-op has just completed a new, 1200-ton fertilizer storage building which is equivalent to about 24, 50-ton cars. It will be filled early in the Fall and again late in the Summer. It regards abandonment of the Sioux Falls District as a "disaster," as it would cost considerably more to move the fertilizer by truck. Transcript page 378. It anticipates a 50-car inbound requirement, per year, for this new facility. In 1976 and 1977, maybe two or three percent of the Co-op's fertilizer came in by a truck-river barge movement from Sioux City. The rest came by rail. The Co-op also would use small hopper cars for outbound shipments of grain if ICG would equalize the freight rates so that it could pay freight on the actual amount of bushels loaded. As rates are now, the Co-op follows a common practice of moving its grain by truck to unit-train loading facilities, 10 to 20 miles away because rates are lower on unit-train shipments. Use of unit-train facilities requires the Co-op to use the elevator facilities of competitors such as the Cargill, a large grain company. The Co-op would prefer to ship hopper cars out of Larrabee direct to the Gulf and would use maybe 30 to 50 of ICG's small hopper cars, a year, for these movements, if rates were adjusted. The Co-op ships corn, oats, and soybeans. It handles about 100,000 bushels of beans a year. Corn is primarily used for local feeding of cattle. It has been three years since the Co-op loaded grain on the ICG at Larrabee.

Archer Cooperative Grain Company is located on the ICG line, at Archer, and has approximately 321 members. The Archer area did not suffer drought conditions in 1975, 1976, or 1977. Fertilizer received by rail amounted to 2,310 tons in 1975; 2,519 in 1976; 2,176 in 1977; and 2,600 projected for 1978. Trucking in the fertilizer would cost $5 to $7 a ton more and take the profit out of such sales. Last year some fertilizer moved into Archer via a truck after a prior movement by river. Rail service is preferred. If the ICG's Sioux Falls District is abandoned, the Co-op hopes to make an arrangement to lease some property on a nearby railroad, have it shipped there in 100-ton cars, and the trucked to its facility. Nearby railroads are the Milwaukee Road and CNW. In 1974, this Co-op brought in 45 railcars of fertilizer and shipped out 134 railcars filled with grain. (The years 1973 and 1974 were when the Russian grain deal took place.) It has used trucks rather than railcars for grain shipments since 1975, after the ICG put the 177,000-pound, weight limitation on the Sioux Falls District. It ships corn and soybeans, primarily corn. About 35 to 40 percent of the corn is used locally, in the form of feed. The corn trucked out moves to the elevator of Cook Industries at Hartley. Cook is a very large, nationwide, grain-marketing company which is about to be taken over by Mitsui, a Japanese company.

Burt's Farm Service, at Calumet, is a fertilizer and chemical supplier located on the ICG Sioux Falls District line. No other railroad serves it. Nearby lines of the CNW are in poor condition. All of its fertilizer, except andydrous ammonia, comes in by rail. As of May 9, it had received 36 railcars of fertilizer in 1978. It usually receives 4,000 tons of fertilizer by rail; but this year it will probably receive substantially more.

Land O'Lakes is a farmer's regional cooperative; and its basic interest is the distribution of fertilizer. To members located along the Sioux Falls District line it shipped 49 railcars of dry fertilizer in 1975; 56 in 1976; 78 in 1977; and 94 projected for 1978. It ships fertilizer from Fort Dodge, IA, to Larrabee, Sheldon, and Rock

Rapids. On an emergency basis, Land O'Lakes ships about five percent of its fertilizer shipments to Sheldon by truck. Land O'Lakes also has a soybean-oil processing plant at Sheldon which uses ICG's Sioux Falls District line to ship to Decatur, IL. The extent of this use is limited by weight restrictions on the line. In any event, most of the soybean oil is shipped to the West Coast.

Ray Alder has an agricultural, lime-spreading business. He receives between 30 and 50 carloads of lime at Calumet from Fort Dodge, IA, over the Sioux Falls District line of ICG. Calumet is his central distribution point. Primarily he receives in the Fall. The lime is unloaded onto trucks and taken by them to the fields for spreading. Abandonment of the line would be inconvenient and might add an expense of between $6,000 and $7,000 due to a need to relocate.

Calumet Feed Service, of Calumet, sells feed. It handles soybeans, corn, and oats. It has used ICG, in the past, but has not done so for two years. It would like to use ICG's Sioux Falls District line to reach the soybean market in the Gulf; but it can only do so, profitably, if the line is upgraded to handle heavier cars. It ships out about 120,000 bushels of beans and maybe 50,000 bushels of corn, a year.

Rock Rapids Community Affairs Corporation has invested in an industrial site in the southeast quadrant of Rock Rapids. The Corporation paid for a rail spur. Abandonment would limit the attraction of industry. The community recently lost the services of the Rock Island Line, by abandonment. The industrial site has water and electricity. At present, there are no industries or firms interested in locating at the site.

A farm equipment dealer, at Rock Rapids, uses ICG for inbound farm machinery, which is handled on flatcars. It receives from 8 to 12 tons a year over the ICG. The machinery is picked up

by its truck, at the track, or driven away. At least half of its machinery comes in on trucks. A railcar can handle about double the pieces of machinery that can be loaded onto a truck.

Hy-Vee Food Stores, Cherokee, withdrew its opposition pursuant to an agreement reached where by ICG is to assure continued service along a two-mile segment of line north of Cherokee, from Milepost 0.0 to 2.0. The agreement is for ICG to lease that portion of the line to the Cherokee Industrial Corporation as an industrial spur for the purpose of developing an industrial park and service to a Hy-Vee Stores' warehouse.

XI. Interests of Railway Labor

At page 24 of its brief ICG states that, following abandonment, affected employees are entitled to protective measures and those prescribed in *Oregon Short Line R. Co. Abandonment—Goshen*, 354 I.C.C. 584 (19) should be adopted in this proceeding.

XII. Environmental Impact, Including Effects on Energy and Rural and Community Development

The October 26 hearing on the environmental issues was held pursuant to requests of SDPUC and UTU. Prior to the hearing, the parties were allowed to inspect the data supporting the conclusions reached by the SEE.[4] A staff member who participated in the preparation of the survey and addendums was cross-examined by the parties. The parties were allowed to present rebuttal testimony on the environmental issues raised in the TAS. Briefs on the environmental issues were filed, after the October 26 hearing, by applicant, SDPUC and UTU. All concerned were allowed to develop, fully, the environmental issues in this proceeding.

[4] "SEE" stands for the Commission's Section of Environment and Energy.

The TAS prepared by the Commission's Section of Energy and Environment (SEE) concludes that this "abandonment proposal would not significantly affect the quality of the human environment [and that] "[p]reparation of a detailed environmental impact statement [EIS], therefore, is not required." Exhibit 15, page 23. At the hearing on the environmental issues it developed that the SEE based the TAS, in large part, upon evidence received from applicant, including advice received after this proceeding was noticed for hearing. Such *ex parte* advice is prescribed by the Commission. See 49 CFR 1100.4(e) and Appendix C thereto. SDPUC, the South Dakota agency charged with responsibility for that State's transportation resources, was not contacted at all by the SEE. Because 62 percent of the total rail trackage in South Dakota is under consideration for abandonment, and because there are ongoing discussions at the Commission of doing a EIS for part of South Dakota, which could include the area served by ICG's Sioux Falls District, SDPUC and UTU argue that an EIS should be prepared for this abandonment proposal.

Applicant supports the conclusions of the TAS, including those that abandonment of this line would have a significant and adverse impact on wildlife habitat in the immediate area, unless the right of way is purchased by someone who will preserve it as a wildlife shelter, and that the abandonment would almost certainly result in an irretrievable loss of a transportation corridor, due to the difficulty of ever reassembling the land, if it is sold off to private persons. These specific conclusions of the TAS are accepted. Several others are not, however.

Not accepted are estimated increases as to fuel usage, air pollution, noise level, and highway wear, should abandonment be effected. The estimates are probably understated to a considerable degree, primarily because they rest on the tenuous assumption that all the traffic at Sheldon and Sioux Falls will continue to move by rail. The bulk of the traffic handled over the Sioux Falls

District originates or terminates at Sioux Falls, so whether Sioux Falls' traffic is diverted to other raillines or to motor carriage is critical to these estimates. The SEE's assumption is based entirely on the existence of trackage at those points and upon timetable speeds. The SEE does not consider the quality of the alternate rail service, its capability of providing an equivalent level of service, or the financial condition of the railroads. Yet the Milwaukee Road, which has trackage at both points, is in bankruptcy and may be liquidated. At Sioux Falls, service by other raillines may be virtually nonexistent, as an ICG official conceded at the hearing. The service offered by other raillines is certainly circuitous or slower between Sioux Falls and the major transportation center of Chicago, as compared to that of ICG's line. Furthermore, much of the traffic at Sioux Falls is piggyback in nature and requires ramping facilities to load and unload. ICG has such facilities at Sioux Falls. However, it is unclear whether the other raillines have any such facilities there, or adequate ones to absorb the additional traffic now being handled by ICG. Piggyback traffic, the type mainly handled over the Sioux Falls District, can easily and quickly move by motor carrier; and when ICG cancelled its fresh-meat tariff in December 1977, that considerable traffic to East Coast markets was, indeed, picked up by motor carriers, not the other raillines serving Sioux Falls. It is safe to assume that any other traffic for which speedy delivery is desirable will also make the shift to motor carriage should ICG be allowed to abandon its line at Sioux Falls.

Also questionable is the SEE conclusion that industrial parks at Sioux Falls and Rock Rapids will not be adversely affected by abandonment of ICG's line. One of the two alternate raillines serving the Sioux Falls park is the financially-troubled Milwaukee Road. The other is the BN, which takes three days to reach Chicago. At Rock Rapids, a 16-acre park presently has only one industry located there and one prospect, neither of which are rail users. ICG is the only railline available to the Rock Rapids park;

and its present underutilization may well be due to the fact that the continued availability of rail service is in doubt.

DISCUSSION AND CONCLUSION

As Division 1 of this Commission has had recent occasion to observe: "In analyzing the substantive aspects of an abandonment, the Commission has the task of weighing the present and future need for the line of railroad (including the effect the abandonment would have on the community served by the line), against the future burden that would be imposed upon the carrier, its system, and interstate commerce, by continued operation." See page 6 of *Illinois Central Gulf Railroad Company Abandonment Between Seely and Mande in Williamson County, IL*, AB-43 (Sub-No. 27), served October 1, 1978, which also lists the factors to be considered, "among others, [as] the revenues that can reasonably be expected to arise from operation of the line, the financial ability of the carrier to continue operation over the line, the current levels of traffic moved over the line, and the traffic potential in the area involved," and also the "availability of alternative means of transportation and cost of maintenance and rehabilitation of the line."

After proper adjustments are made for labor costs, as already discussed above, the revenues generated by the Sioux Falls District have been sufficient to make a contribution to the ICG over the years for which there is data in the record. This has been true in spite of drought years, a labor strike against one of its largest shippers during these years (Iowa Beef Packers) and the use of dilapidated, leased equipment for providing the considerable service to fresh-meat shippers. Normally, if users of a line furnish sufficient traffic to pay operating costs, the operation of the line is not deemed to impose an undue burden upon the carrier or upon interstate commerce. *Chicago, M, St.P and P. R. Co., Abandonment*, 348 I.C.C. 749, 753 (1976).

The fact that traffic has diminished over the line is a direct result of ICG's relinquishing a primary source of revenue—fresh meat in ICG-furnished refrigerated trailers. The cancellation of its fresh-meat tariff in the same month that it filed this abandonment application suggests that ICG was artificially building up a case for itself. There is nothing in the record to suggest that fresh-meat traffic cannot be recaptured, should ICG again obtain some equipment to service fresh-meat shippers.

Some grain traffic has also been lost to lines capable of handling large, unit trains; but grain movements have never been substantial over the Sioux Falls District. There are, however, some small grain shippers over this line who foresee an increase in the need for small grain cars, and some grain shippers who would revert to use of the Sioux Falls District line, if ICG would make it attractive for them, ratewise. Nothing on the record indicates that ICG cannot recapture enough traffic along this line to maintain a profitable operation.

Out of these profits, ICG should be able to pay off the bridge rehabilitation costs within a few years. As the Commission held in ICG's Sub-No. 27 proceeding, ibid, rehabilitation expense is a cost that should be capitalized over a period of years when considering its burden to the carrier. While ICG is not a financially-strong railroad, it should be able to absorb the bridge-rehabilitation costs, to the extent that profits of the Sioux Falls District may fall short of covering them.

The desire of ICG to abandon the Sioux Falls District probably arises, in large part, from the low rate of return being realized on the investment in this line. At a modest rate of return of 9 percent a year, ICG calculates that it should receive $559,072 on its investment base in the Sioux Falls District. See page 8 of Appendix A to Exhibit 7. Excluding off-branch costs from the working capital figure, as discussed above, would lower that figure by several thousand dollars. But even so lowered, the Sioux Falls

District has not generated that high a rate of return during the years for which there is data in the record. Of course, the amount of the investment base itself is highly speculative, as it depends upon land sales for which there are currently no offers, and an assemblage factor even though ICG itself doubts that it will be sold in one piece. Division 1 of the Commission commented, in ICG's Sub-No. 27 abandonment proceeding, ibid, that there is a question as to the proper interpretation to be given "opportunity costs" (rate of return) in abandonment proceeding, and that the matter is one of general transportation importance being examined in *Texa & Pacific Railroad Company—Abandonment Between San Martine and Rockhouse, in Colberson County, Texas*, AB-20 (Sub-No. 3). Under the factual circumstances of the Sub-No. 27 proceeding, Division 1 found no reason to hold that decision in abeyance pending a resolution of the treatment to be accorded rate of return.

Rate of return on the investment base of the Sioux Falls District has been considered in reaching this decision, however. As, the Supreme Court has ruled, in abandonment proceedings an effort must be made to decide "what fairness to all concerned demands." (*Colorado* v. *United States*, 271 U.S. 153, 168 (1926)); and it is fair for a railroad to receive a reasonable rate of return on its investments. Should ICG be allowed to convert its investment in this line to cash, the use of the resulting dollars could go into the upkeep of other lines handling more traffic. However, ICG makes no commitment as to its use of any the funds which might flow from abandonment of its Sioux Falls District. These funds might end up as part of the purchase price of another soft-drink business which ICG's parent plans as one foundation for its long-range structure. (In the year the Sioux Falls District line enjoyed its highest profit, IC Industries did purchase Bubble Up.) While it might well be in the public interest for ICG to divert its investment in the Sioux Falls District into other raillines, it would not be in the public interest to sacrifice an irre-

trievable transportation corridor to such businesses as IC Industries currently plans for its structure. Nor it is unfair to ask IC Industries to forego maximizing its rate of return on investments and to continue the operation of a rail property which at least has reasonable prospects of operating at a profit, albeit at a lower rate of return than non-rail properties might generate. After all, IC Industries got its start from the wealth of ICG, which is a land-grant railroad; and through ICG, IC Industries is benefitting from massive infusions of Federal funds to enable its subsidiary to continue to serve the public. These circumstances mitigate any unfairness to the railroad.

Also to be considered is whether it is fair for the communities and rural areas along the Sioux Falls District to lose a railline just because its rate of return on investment value may not be sufficiently high. In this regard, Congress now requires that consideration be given, in abandonment proceedings, to whether abandonment "will have a serious, adverse impact on rural and community development." See 49 USC 10903 (1978) a recent codification of the Interstate Commerce Act and related laws. The loss of ICG's Sioux Falls District line seems more likely than not to have such an effect. This line is a direct railline between the area served and Chicago, East Coast, and the Gulf of Mexico markets. Even if ICG reduces speeds to 10 miles an hour, the directness of its route gives ICG an advantage over alternate rail service at the point generating most of the traffic, Sioux Falls. Alternate rail service at Sioux Falls is circuitous and its quality, to the extent it was proved, is poor. The availability of enough trucks to absorb ICG's traffic is uncertain. Small grain shippers, albeit few in number, will be forced to rely upon grain elevators of their competitors which are large companies and one of which is about to be purchased by a foreign interest. Farmers can expect to pay more for fertilizer as it costs more to move it by truck. Consumers can expect to see a rise in price of products, such as bread, to cover increased transportation costs of trucking. The industrial park at

Rock Rapids will lose all rail service, which will certainly hamper development prospects in that community. The industrial park at Sioux Falls will be left with only the poor services of the bankrupt Milwaukee Road, which faces the prospect of liquidation, and the slow service of the BN. Some businesses along the line will have to relocate. Transportation patterns will be disrupted.

On this record ICC has not met the burden, which Congress placed squarely upon it, of proving by "reliable, probative and substantial" evidence that "the present or future public convenience and necessity require or permit the abandonment. . . ." See 5 USC 556(d)(1976) and 49 USC 10904(b)(1978).

The consequences of denying this application will most likely have some beneficial effects upon environmental and energy concerns. A wildlife habitat will be preserved. And rail traffic will not be diverted to motor carriers, which would probably use more fuel to handle the same amount of traffic, create more noise and air pollution and inflict highway wear. Because of the relatively small amount of traffic and area involved, however, these consequences do not elevate this decision denying the application to a major Federal action involving environmental and energy matters.

Other issues raised by UTU and SDPUC need not be further discussed or resolved, in view of this outcome.

ULTIMATE FINDINGS AND ORDER

Upon consideration of all the evidence of record, the Administrative Law Judge finds that issuance of a certificate to abandon applicant's Sioux Falls District, from Milepost 0.0 at Cherokee, IA, to Milepost 94.47 at Sioux Falls, SD, is not consistent with the public convenience and necessity. It is further found that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environment Policy Act of 1969, or a major regulatory action under the Energy Policy and Conservation Act of 1975.

The application is denied. This order is effective 20 days from the date of service, in the absence of an appeal or a stay by the Commission.

By the Commission, Isabelle R. Cappello, Administrative Law Judge.

G. HOMME, JR.
Secretary

(SEAL)

APPENDIX G

Pertinent sections of 49 U.S.C. (Supp. III) 10903 *et seq.* and 49 C.F.R. 1121 *et seq.* are set forth below.

49 U.S.C. 10903:

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(b)(1) A proceeding to grant authority under subsection (a) of this section begins on application filed with the Commission. Subject to section 10904-10906 of this title, if the Commission—

(A) finds public convenience and necessity, it shall—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions that the Commission finds are required by public convenience and necessity; or

(B) fails to find public convenience and necessity, it shall deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

(c) Except as provided in section 10905 and 10906 of this title—

(1) if a certificate is issued without an investigation under section 10904(c) of this title, the abandonment or discontinuance may take effect under the certificate on the 30th day after the issuance of the certificate; or

(2) if a certificate is issued after an investigation under section 10904(c) of this title, the abandonment or discontinuance may take effect under the certificate on the 120th day after the issuance of the certificate.

49 U.S.C. 10905:

(a) In this section—

(1) "avoidable" means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or

discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—

(A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

(2) "reasonable return" means—

(A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Interstate Commerce Commission; and

(B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Commission.

(b) When the Commission finds under section 10903 of this title that the present or future public convenience and necessity require or permit abandonment or discontinuance, it shall publish the finding in the Federal Register. If, within 30 days after the publication, the Commission finds that—

(1) a financially responsible person (including a governmental authority) has offered financial assistance to enable the rail transportation to be

continued over that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to—

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance for a reasonable time, not to exceed 6 months, to enable the person or governmental authority to enter into an agreement with the rail carrier to provide the assistance or to buy that part of the railroad line and to continue to provide rail transportation over the line. Thereafter, the Commission shall determine the extent to which the avoidable cost of providing rail transportation plus a reasonable return on the rail properties involved exceed the revenues attributable to the railroad line or the rail transportation proposed to be abandoned or discontinued. On notice to the Commission that such an agreement has been executed, the Commission shall further postpone the issuance of the certificate as long as the agreement, or an extension or modification of the agreement, is in effect.

(c) The rail carrier shall provide promptly to a party considering offering financial assistance under subsection (b) of this section—

(1) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance; and

(2) traffic, revenue, and other data necessary to determine the amount of financial assistance that would be required to continue rail transportation over that part of the railroad line.

49 C.F.R. 1121.32:

Applications for certificates of public convenience and necessity permitting the abandonment of railroad lines or the discontinuance of rail service shall contain the following information and each paragraph (a) through (i) of this section shall be attested to by a person having personal knowledge of the matters contained therein:

(d) *Revenue and cost data.* (1) Computation of the revenues attributable, avoidable costs, and reasonable return on value for the line to be abandoned for the base year (as defined by §1121.11(c) and to the extent such branch level data is available), in accordance with the methodology prescribed in §§1121.41-1121.45, as applicable, and submitted in the form called for in §1121.46, as Exhibit 1.

49 C.F.R. 1121.42:

This section defines: Which cost elements are eligible for inclusion in the calculation of avoidable costs; the conditions under which certain cost elements become eligible for inclusion; and the basis of apportioning those cost elements which are not assigned to the branch on an actual expense basis. The avoidable costs of providing freight service on a branch shall be the total of the costs

assigned to the branch in accordance with this section. Those expenses apportioned under this section shall be derived from the latest Form R-1 or Form R-2 of the railroad filed with the ICC prior to the conclusion of the subsidy year, and assigned to the branch according to the procedures set forth in §1121.43 of these regulations. When the term —Actual" is specified as the basis for assigning an expense, it shall mean that the only costs which can be assigned to the account are those costs which are incurred solely as a result of the continuation of rail freight service on the branch. The accounts in the following charts, which list only the —freight-only" account numbers, shall include the portion of common expenses that have been apportioned to freight service.

(c) Transportation

(1) Train operations:

Operating expense group and accounts	Previous account No.	Present account No.	Basis of assignment to on-branch costs
Engine crews			
Salaries and wages	392	11-31-56	Do.
Materials	402	21-31-56	Train hours, sec. 1121.43(c)(1)(i).
Purchased services	402	41-31-56	Actual
Other expenses	402	61-31-56	Do.

Operating expense group and accounts	Previous account No.	Present account No.	Basis of assignment to on-branch costs
Train crews			
Salaries and wages	401	11-31-57	Do.
Materials	402	21-31-57	Train hours, sec. 1121.43(c)(1)(i).
Purchased services	402	41-31-57	Actual.
Other expenses	402	61-31-57	Do.

49 C.F.R. 1121.46:

The following information shall be submitted by applicant as Exhibit 1 to an abandonment or discontinuance application (§1121.32(d)) and shall be developed in accordance with the methodology established in §1121.41-45, as applicable. Such information, form, and methodology shall also be used by an offeror of financial assistance to formulate a Proposed Subsidy Payment (§1121.38).

	Base year operations	Projected subsidy year operations
Revenues attributable for		
1. Freight originated and or terminated on branch		
2. Bridge traffic		
3. All other revenue and income		
4. Total revenues attributable (lines 1 through 3)		

	Base year operations	Projected subsidy year operations
Avoidable costs for		
5. On-branch costs (lines 5a through 5j)		
a. Maintenance of way and structures		
b. Maintenance of equipment		
c. Transportation		
d. General administrative		
e. Deadheading, taxi, and hotel		
f. Overhead movement		
g. Freight car costs		
h. Return on investment—locomotives		
i. Revenue taxes		
j. Property taxes		
6. Off-branch costs		
7. Total avoidable costs (line 5 plus line 6)		
Subsidization costs for		
8. Rehabilitation[1]		
9. Administration costs (subsidy year only)[2]		
10. Casualty reserve account[2]		
11. Total subsidization costs (lines 8 through 10)		

[1]Projection shall include amounts necessary to attain FRA class I safety standard.

[2]Omit in applications pursuant to secs. 1121.32 and 1121.33.

	Base year operations	Projected subsidy year operations
Return on value for		
12. Valuation of property (lines 12a through 12c)		
a. Working capital		
b. Income tax benefits		
c. Net liquidation value		
13. Rate of return		
14. Total return on value (line 12 times line 13)		
15. Avoidable loss from operations (line 4 minus line 7)		
16. Estimated subsidy (line 4 minus lines 7, 11 and 14)		